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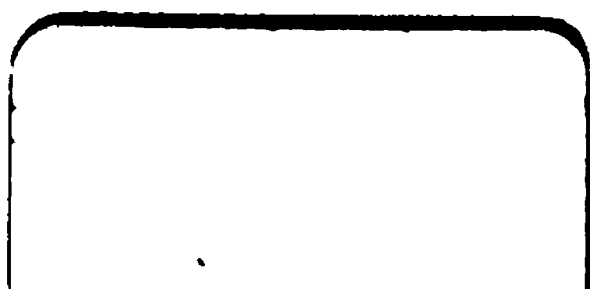
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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURT OF COMMON PLEAS

FOR THE

CITY AND COUNTY OF NEW YORK.

By CHARLES P. DALY, LL.D.,

OFFICIAL REPORTER OF THE COURT.

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ROGER A. PRYOR	1890*

JUDGES DURING THE PERIOD EMBRACED IN THIS VOLUME.

RICHARD L. LARREMORE,† CHIEF JUSTICE.

JOSEPH F. DALY,‡ CHIEF JUSTICE.

ROGER A. PRYOR.

MILES BEACH.

HENRY WILDER ALLEN.

HENRY W. BOOKSTAVEN.

HENRY BISCHOFF.

* Still on the Bench.

† Resigned, October 1st, 1890.

‡ Appointed Chief Justice, October 11th, 1890.

TABLE OF CASES

REPORTED IN THIS VOLUME.

A			
Abrahamson, Arnson v.....	72	Brockman v. Buell,.....	90
Anderson, Carter v.....	487	Bryce, Matter of.....	443
—— v. Cullen.....	15	Buddin v. Fortunato.....	195
—— v. Hamilton.....	18	Buell, Brockman v.....	90
Aplington, Matter of....	379	Byron v. Bell.....	198
Arata, Tocci v.....	494		
Arnson v. Abrahamson.....	72	C	
Arnstein v. Haulenbeek....	382	Carroll, Berg v.....	73
Ash v. Purnell.....	189	Carstens v. Schmalholz.....	26
Atlas Steamship Co., Geoghe-		Carter v. Anderson.....	437
gan v... ..	229	Catterbury, Schnauffer v.....	353
		Chemical Nat. Bank v. Colwell..	28
		Claffy v. O'Brien.....	204
		Clark, Close v.....	91
		—— Floyd v.....	528
		Clemens, House v.....	3
		Clenighan v. McFarland.....	402
B		Close v. Clark.....	91
Barnes, Ramsay v....	478	Coffey v. Lyons.....	207
Barron v. Yost... ..	441	Cohen Matter of.....	69
Bauer, French v.....	309	—— Goodman v... ..	47
—— Woarms v.....	333	—— v. Hershfield.....	96
Baumann v. Post.....	385	Colwell, Chemical Nat. Bank v..	28
Beatty v. Thilemann.....	20	Connolly, Dreher v.....	106
Bell, Byron v.....	198	Coogan, Levy v.....	137
Benesch v. John Hancock Mut.		Copley v. Hay.....	446
Life Ins. Co.....	394	Crager v. Reis.....	450
Berg v. Carroll.....	73	Craig, Frost v.....	107
Berkshire Apartment Assoc.,		Crotty, O'Neill v.....	474
Egan v.....	218	Cullen, Anderson v.....	15
Better v. Prudential Ins. Co....	344	Cumber v. Schoenfeld.....	454
Bien, Springer v.....	275	Curtis v. Soltan.....	490
Biggart v. Manhattan R. Co....	508		
Bilordeaux v. H. Beneke Lith.			
Co.....	78		
Bindsell, Johnson v.....	232		
Blair, Matter of.....	540		
Blake v. Voight.....	398		
Bohm v. V. Loewer's Gambrinus			
Brewery Co.	80		
Bond v. Brewster.....	82		
Boyd, Matter of.....	443		
Boys, Darrah v.....	209		
Brewster, Bond v.....	82		
Broadway & S. A. R. Co., Whit-			
field v.....	288		
		D	
		Darrah v. Boys.....	209
		Dean, Myers v.....	251
		Deeley v. Dwight.....	300
		Deimel v. Scheveland.....	34
		Demarest v. Flack.....	337
		Devlin v. Farmer.....	98
		De Witt Wire-Cloth Co. v. New	
		Jersey Wire-Cloth Co.....	529

Dilling v. Draemel.....	104	Hay, Copley v.....	446
Dittman, Smith v.....	427	H. Bencke Lith. Co., Bilordeaux v.....	78
Doran & Wright Co., Talbot v..	174	Healey v. Terry.....	117
Doyle v. Manhattan R. Co.....	506	Heilman, Krahner v.....	132
Draemel, Dilling v.....	104	Heindel, Schwab v.....	164
Dreher v. Connolly.....	106	Hershfield, Cohen v.....	96
Dry Dock, E. B., & B. R. Co., Seitz v.....	264	Hill v. London Assur. Corp.....	120
Dwight, Deeley v.....	300	Hockanum Co. v. Lincoln.....	325
E			
Eagle Tube Co. v. Edward Barr Co.....	212	Holland v. Mayor, etc., of New York.....	124
Eckhardt, Hammond v.....	113	House v. Clemens.....	3
Edel v. McCone.....	216	Howe, O'Neill v.....	181
Edward Barr Co., Eagle Tube Co. v.....	212	Humbert, Lane v.....	186
Egan v. Berkshire Apartment Assoc.....	218	Hume v. George C. Flint Co....	360
Eisler v. Union Transfer & S. Co.	456	Hunt, Lathers v.....	135, 349
F			
Farmer, Devlin v.....	98	I	
Fisher v. Monroe.....	461	Isaacs v. Mintz.....	468
Flack, Demarest v.....	337	J	
—— Lewis v.....	240	James v. Ford.....	126
Flanagan v. Mitchell.....	223	Jancksok, Gross v.....	346
Floyd v. Clark.....	528	John Hancock Mut. Life Ins. Co., Benesch v.....	394
Ford, James v.....	126	Johnson v. Bindseil.....	232
Fortunato, Buddin v.....	195	Jordan v. New York & H. R. Co.	130
French v. Bauer.....	309	Judd, Hames v.....	110
Frost v. Craig.....	107	Judd L. & S. Oil Co., Whitte- more v.....	290
G			
Gallagher v. Reilly... ..	227	K	
Geib, Seidman v.....	434	Kahn, Weil v.....	286
Geoghegan v. Atlas Steamship Co.....	220	Kennedy, McGrane v.....	241
George C. Flint Co., Hume v....	360	Knowlton, Mayo v.....	245
Gerard v. McCormick.....	40	Koehler v. Schelder.....	235
Giblin, Russell v.....	258	Krahner v. Heilman.....	132
Goerlitz, Rotter v.....	484	Kurtz, People v.....	188
Goltze, People v.....	62	L	
Goodman v. Cohen.....	47	Lane v. Humbert.....	186
Grant v. Tefft.....	49	Lathers v. Hunt.. ..	135, 349
Gray v. Manhattan R. Co.....	510	Lawrence v. Metropolitan El. R. Co.....	501
Gross v. Jancksok.....	346	Levin v. Standard Fashion Co..	404
H			
Hames v. Judd.....	110	Levy v. Coogan.....	137
Hamilton, Anderson v.....	18	—— v. Mintz.....	408
Hammond v. Eckhardt.....	113	Lewis v. Flack.....	240
Hannay v. Zerban.... ..	372	Lincoln, Hockanum Co. v.....	325
Harft v. Tonnelli.....	115	—— Springville Manuf. Co. v..	318
Hatch, Willetts v.....	328	Lines v. Shepard.....	471
Haulenbeek, Arnstein v.....	382	Littell, Matter of.....	379
		London Assur. Corp., Hill v....	120
		Luthy, Regan v.....	413
		Lyon, Shook v.....	420
		Lyons, Coffey v.....	207

TABLE OF CASES REPORTED.

vii

M

McCone, Edel v.....	216
McCormick, Gerard v.....	40
McFarland, Clenighan v.....	402
McGrane v. Kennedy.....	241
McNab, Phillips v.	150
Madden, People v.....	63
—— Rice v.....	156
Manhattan R. Co., Biggart v....	508
—— Doyle v.....	506
—— Gray v.....	510
—— Morsemann v.....	249
—— Thompson v.....	64
—— Werfelman v.....	355
Mattern v. Sage.....	142
Mayo v. Knowlton.....	245
Mayor, etc., of New York, Hol- land v.....	124
—— O'Connor v.....	58
Metropolitan El. R. Co., Law- rence v.....	501
—— Myers v.....	410
—— Perls v.....	255
Mintz, Isaacs v.....	468
—— Levy v.....	468
Mitchell, Flanagan v.....	223
Mitchill, Schackelford v.....	268
Moench v. Yung.....	143
Monroe, Fisher v.....	461
Mooney v. New York El. R. Co..	145
Morgan, Shailer v.	166
Morsemann v. Manhattan R. Co.	249
Myers v. Dean.....	251
—— v. Metropolitan El. R. Co.	410

N

New Jersey Wire-Cloth Co. v. De Witt Wire-Cloth Co.....	529
New York & H. R. Co., Jordan v.	130
New York Cent. & H. R. Co., Quill v.....	313
New York El. R. Co., Mooney v.	145
—— Rich v.....	518
—— Sanders v.....	261
—— Welsh v.....	515

O

O'Brien, Claffey v.....	204
O'Connor v. Mayor, etc., of New York.....	58
O'Neill v. Crotty.....	474
—— v. Howe.....	181

P

People v. Goltze.....	62
—— v. Kurtz.....	168

People v. Madden	63
—— v. Rofrano.....	148
Perls v. Metropolitan Life Ins. Co.....	255
Phillips v. McNab.....	150
Post, Baumann v.....	385
Prudential Ins. Co., Better v....	344
Pryor, Smith v.....	169
Purnell, Ash v.....	189

Q

Quill v. New York Cent. & H. R. Co.....	313
--	-----

R

Ramsay v. Barnes.....	478
Read, Totten v.....	282
Regan v. Luthy.....	413
—— v. Traube.....	152
Reilly, Gallagher v.....	227
Reis, Crager v.....	450
Rice v. Maddox.....	156
Rich v. New York El. R. Co....	518
Roeding v. Sons of Moses.....	417
Rofrano, People v.....	148
Rosenblatt, Wise v.....	496
Ross v. Simon.....	159
Rotter v. Goerlitz.....	484
Russell v. Giblin.....	258

S

Sanders v. New York El. R. Co.	261
Sage, Mattern v.....	142
Schackelford v. Mitchill.....	268
Scheider, Koehler v.....	235
Scheveland, Deimel v.....	34
Schmalholz, Carstens v.	26
Schnauffer v. Catterbury.....	353
Schoenfeld, Cumber v.....	454
Schwab v. Heindel.....	164
Seidman v. Geib.....	434
Seitz v. Dry Dock, E. B., & B. R. Co.....	264
Shailer v. Morgan.....	166
Shepard, Lines v.....	471
Shields, Williams v.....	178
Shook v. Lyon.....	420
Simon, Ross v.....	159
Smith v. Dittman.....	427
—— v. Pryor.....	169
Soltau, Curtis v.....	490
Sons of Moses, Roeding v.....	417
Spies v. Voss.....	171
Springer v. Bien.....	275
Springville Manuf. Co. v. Lin- coln.....	318
Standard Fashion Co., Levin v..	404

TABLE OF CASES REPORTED.

Steffens v. Steffens.....	363	Voight, Blake v.....	398
Stone v. Thaden.....	280	Voss, Spies v.....	171
T		W	
Talbot v. Doran & Wright Co... 174		Weil v. Kahn.....	286
Tefft, Grant v.....	49	Welsh v. New York El. R. Co... 515	
Terry, Healey v.....	117	Werfelman v. Manhattan R. Co. 355	
Thaden, Stone v.....	280	Whitfield v. Broadway & S. A. R.	
Thilemann, Beatty v.....	20	Co.....	288
Thompson v. Manhattan R. Co. 64		Whittemore v. Judd L. & S. Oil	
Tocci v. Arata.....	494	Co.....	290
Tonnelli, Harft v.....	115	Willetts v. Hatch.....	328
Totten v. Read.....	282	Williams v. Shields.....	178
Traube, Regan v.....	152	Wise v. Rosenblatt.....	496
U		Woarms v. Bauer.....	333
Union Transfer & S. Co., Eisler		Y	
v.....	456	Yost, Barron v.....	441
V		Yung, Moench v.....	148
Vincent v. Vincent.....	534	Z	
V. Loewer's Gambrinus Brewery		Zerban, Hannay v.....	372
Co., Bohm v.....	80		

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
FOR THE
CITY AND COUNTY OF NEW YORK.

EDWARD H. HOUSE, Plaintiff, *against* SAMUEL L. CLEMENS
et al., Defendants.

[SPECIAL TERM.]

(Decided January, 1890.)

Plaintiff, an author of experience and familiar with the art of constructing plays, having suggested to defendant C. that a novel written by C. could be successfully dramatized, C. wrote to plaintiff that he wished plaintiff would dramatize the work, if he would take one-half or two-thirds of the proceeds, and asked whether he should send plaintiff a copy of the book; plaintiff answered that he would be pleased to undertake the dramatization of it, and asked C. to send a copy of the book; and C. replied that he had ordered a copy sent to plaintiff. Several months afterwards, plaintiff read or gave to C. the first act of his play; and plaintiff testified that C. expressed himself as pleased, and directed plaintiff to go on and complete it; and, although this was denied by C. he did not suggest that he instructed plaintiff to abandon it. Their testimony as to subsequent communications between them was conflicting; but it appeared that when C., two years after his first proposition to plaintiff, arranged with defendant R. to prepare a dramatization of the same work, he suggested to R. collaboration with plaintiff. This R. declined, and prepared a dramatization of the novel, which was produced on the stage by defendant F., as manager, under an arrangement between C., R., and F.

House v. Clemens.

Held, that the proposition by C. and acceptance by plaintiff constituted a contract; that the lapse of time between the making of it and the arrangement with R. did not affect plaintiff's rights under it, time not being essential; that as plaintiff had no adequate remedy at law for the breach of it, and as a specific performance by C. was shown to be possible, although the court could not practically enforce performance, injunction was the proper remedy, to compel C. either to carry out his contract or lose all benefit from it; and that, it appearing that the other defendants had notice of plaintiff's rights, they should all be restrained from the performance of any dramatization of the book by any person other than plaintiff.

MOTION for an injunction.

The facts are stated in the opinion.

Morgan & Ives, for plaintiff.

Alexander & Green, for defendant Clemens.

Howe & Hummell, for defendants Frohman and Richardson.

J. F. DALY, J.—The plaintiff, who is an author of experience and familiar with the art of constructing plays, suggested to the defendant Clemens that the latter's book or novel called "The Prince and the Pauper" could be successfully dramatized, and the latter wrote to the plaintiff on December 17th, 1886, a letter in which he said: "You have spoken of 'The Prince and the Pauper' for the stage. That would be nice, but I cannot dramatize it. The reason I say this is because I did dramatize it, and made a bad botch of it; but you could do it, and if you will take one-half or two-thirds of the proceeds I wish you would. Shan't I send you the book?" On the 24th of December, 1886, the plaintiff wrote to Mr. Clemens a letter, saying: "As regards 'The Prince and the Pauper,' I should be well pleased to undertake the dramatization of it. I shall be glad if you will send me a copy of the book. According to my remembrance of

House v. Clemens.

the book, the most taking stage arrangements would be to give both characters to the same performer, using a silent double in positions where they must for a moment appear together. If there is anywhere about a girl like what Lotta was twenty years ago, or Bijou Heron fifteen years ago, she might fill the duplicate part; but for such selection and other business details you know I am now incompetent. Doubtless there are plenty of trustworthy men to take that matter in hand. In a day or two I shall have finished work on a libretto for a comic opera I have had to write, and shall be ready for fresh fields and pastures new." On the 26th of December, 1886, Mr. Clemens wrote to the plaintiff: "I've ordered a copy of P. and P. to be sent to you. I've done up my absurd P. and P. dramatization, and will express it to you to-day or to-morrow." The plaintiff says that subsequently Mr. Clemens came to New York, and it was then agreed that plaintiff was to receive at least one-half of the proceeds, and when it should be deemed expedient to put the play upon the stage, deponent was to take such active part in the business arrangement as his physical condition would permit. Plaintiff has been for more than ten years an invalid, and for seven years confined to his bed or chair. Plaintiff states that he wrote several letters in April and May, 1887, to Mr. Clemens, giving his reflections on the work of dramatization of the play, and concerning the proper person to perform the principal characters; also stating from time to time what progress he had made in the work. That on the 13th of June, 1887, he had completed the first act, and read it to Mr. Clemens, who expressed himself pleased with it, and in the same month it was agreed between them that deponent should proceed without delay, and finish the play as rapidly as possible. In August, 1887, plaintiff wrote to Mr. Clemens that he had the satisfaction of seeing the whole five acts completed, with the single exception of the last scene of the fifth act, and two weeks afterwards stated to Mr. Clemens that the play was ready at any time, and that he wished to hear from Clemens at his

House v. Clemens.

convenience. Subsequently, and up to January, 1889, he had conversations with Clemens in which he endeavored to interest him in the subject of the play, and its performance, but without success. That in February, 1889, he wrote to Mr. Clemens of a rumor he had heard that the latter was occupying himself with the dramatization of one of his books, and called his attention to the business of "The Prince and the Pauper." Having had no reply to this letter, that he wrote again on the 25th of February, 1889, again calling Mr. Clemens' attention to the dramatization of "The Prince and the Pauper." That on February 26th, 1889, he received a letter from Mr. Clemens containing the following: "I gather the idea from your letter that you would have undertaken the dramatization of that book. Well, that would have been joyful news to me about the middle of December, when I gladly took the first offer that came and made a contract. I remember that you started once to map out the frame-work for me to fill in, and I suggested to this lady that possibly you would collaborate with her, but she thought she would do the work alone. However, I never thought of such a thing as your being willing to undertake the dramatization itself. I mean the whole thing. I will look in when I come down." On April 17th, 1889, the defendant Frohman called on the plaintiff, and told him he was about to produce a dramatization of "The Prince and the Pauper," written by the defendant Mrs. Richardson under a contract with Mr. Clemens. That deponent thereupon notified Frohman of his claim to the exclusive right to dramatize the book. The dramatization by Mrs. Richardson, under the authority of Mr. Clemens, was performed in Philadelphia by Mr. Frohman's company on the 24th day of December, 1889, and is being played at this time in the city of New York. In this dramatization the principal characters of "The Prince and the Pauper" are performed by one person, as suggested by the plaintiff, and it is also claimed by the latter that a particular scene invented by him is used in the play now performing.

House v. Clemens.

The defendant Clemens does not deny the writing of the letter of December 17th, 1886, first above referred to, in which he proposes the dramatization, but declares that he is not able, not having kept a copy of the letter, to say whether the extract given by the plaintiff is correct or not. He produces in full the plaintiff's reply, dated December 24th, 1886, which is in these words, so far as this particular matter is concerned: "MY DEAR MARK: As regards 'The Prince and the Pauper,' I should, of course, be well pleased to undertake the dramatization of it, though why you imagine I should be able to make a better piece of work than you can I do not understand. In any case, I hope you would let me see your version, as I might discover at the very start that I could not do so well. You would have to bear in mind that even if I should achieve a play of superlative and unprecedented merit, I am in no condition to look after its acceptance and production, *i. e.* the business part of the production. Managers are all of a new generation. Though I know the sort of persons required for properly acting such a piece, I don't know where such persons are to be found, nor whether they exist. According to my remembrance of the book, the most taking stage arrangement would be to give both characters to the same performer, using a silent double in positions where they must for a moment or two appear together. If there is anywhere about a girl like what Lotta was twenty years ago, or Bijou Heron fifteen years ago, she might fill the duplicate part; but for such selection and other business details you know I am now incompetent. Doubtless there are plenty of trustworthy men to take that matter in hand; so I shall be able, if you will send me a copy of the book, the commonest copy you have, as I shall use it roughly, (Koto will be delighted, as she has never read it, considering her choice copy as too good to be cut open.) In a day or two I shall finish work on a libretto for a comic opera I have got to write, and I shall be ready for fresh fields and pastures new."

The defendant regards the foregoing as a qualified accept-

House v. Clemens.

ance of the proposition to dramatize the work. He says that he sent the plaintiff the books and his own dramatization, and that he had some further conversation with the plaintiff about it, but it was very general; that he has no recollection of receiving any letter or letters from the plaintiff reporting his progress in the work of its completion; that the plaintiff wrote an outline or skeleton of the first act, with, perhaps, a little of the dialogue, and brought it to him to fill in; that he did not use the language attributed to him, nor anything like it, at the reading of the play, and that nothing was said about completing the work; that he did not agree to fill in the play, and that the matter dropped between him and the plaintiff; that the plaintiff was only to try his hand at a dramatization, and he never gave him any exclusive right to dramatize the work, and never agreed to do anything, or write anything, in conjunction with him; that no contract was made or ratified between them; that after the receipt of the letter of December 24th, 1886, he did not think plaintiff could do much in the way he desired, and did not obligate him to do it, nor obligate himself to allow plaintiff to do it; that, after the skeleton or outline of the first act was brought to him, (in June, 1887,) he never heard of it again until after he had given the defendant Mrs. Richardson permission to dramatize the book, and did not know plaintiff was engaged upon a dramatization, but wrote to Mrs. Richardson that plaintiff had done some work, and asked her to see him, and perhaps they could collaborate, but this she declined to do, saying she could do the work herself. He produces two letters from plaintiff of March and April, 1887, referring to the plaintiff's proposed visit to defendant in June, 1887, in which no mention is made of the dramatization. It was upon this visit that the plaintiff gave or read to him the first act of the proposed play, or the outline of the first act.

From the statements of both parties, it is manifest that Mr. Clemens made a distinct proposition to plaintiff to dramatize the work, and that the latter accepted it, and

House v. Clemens.

that this was in writing on both sides,—in their respective letters of December 17th and December 24th, 1886, and that in June, 1887, plaintiff read or gave to defendant a portion of the work. The plaintiff says he was directed by defendant to go on and complete it. This is denied, but it is not suggested that plaintiff was instructed to abandon it. Mr. Clemens held his own views as to plaintiff's being able to do what he had undertaken, but it is manifest that plaintiff proceeded, and completed it. Whether the letters reporting progress were received or not is a question of fact, which need not be determined in order to arrive at a conclusion as to the rights of the parties. There were some conversations which defendant characterizes as general, but the substance of which he does not give. Plaintiff is very precise in his account of them. In the multitude of professional work pressing upon so busy and popular an author as Mr. Clemens, much may have escaped his recollection that would not be forgotten by an invalid like the plaintiff, confined to his bed or his chair, and conceded to be a man of methodical habits in recording the details of his correspondence or conversations. The plaintiff's positive recollection might be regarded as satisfactory evidence on these points, if opposed to the defendant's want of recollection.

But, if nothing had been said or written by plaintiff to Mr. Clemens about the progress of the work after June, 1887, it in no way affected the rights of the parties based upon the original proposition and its acceptance. This acceptance is said to be qualified, but I do not think it may be justly so considered. The plaintiff expresses himself with modesty as to the results of his undertaking, but this is, perhaps, but the conventional self-disparagement of conscious merit. It probably did not mislead an author as experienced as Mr. Clemens, who is himself not given to boasting of results before he has achieved them. There being, as I have said, a definite proposition made, and an acceptance and a contract thus entered into, the plaintiff could go on with his part of the work, and there was no need to say or

House v. Clemens.

do anything further until the discovery of a suitable person to perform the principal parts in the play. Everything depended upon finding such a person. The plaintiff suggests it at the outset, and the defendant does not question it. Time was not essential in the performance of the contract. No time was fixed for plaintiff to complete the play, and no demand was made upon him for performance. The period that elapsed between the contract in December, 1886, and the date when Mr. Clemens made his arrangement with Mrs. Richardson, in December, 1888, even if plaintiff had not in the meantime written nor spoken to Mr. Clemens about the work, would not affect the rights of the parties. It certainly was not so great as to efface from the mind of the defendant the fact that the plaintiff had been at work on the play, for he mentioned the circumstance to Mrs. Richardson, and suggests her collaborating with the plaintiff. It would not warrant the inference that plaintiff had abandoned the work.

There being a contract between the parties which has never been rescinded, the question is whether the plaintiff is entitled to enforce it in the way he seeks; that is, by injunction against performances by the defendant Clemens, and the defendants Mrs. Richardson and Mr. Frohman, of any dramatization of the book except that prepared by the plaintiff. It is contended by the defendant Clemens that this contract is materially deficient and uncertain, and incapable of being carried into effect without the court making another and further agreement for the parties; that it does not specify when, where, or how the play is to be written or performed; and therefore it cannot be specifically enforced; and that, if plaintiff prevents a performance of the play now acting, there is no certainty that the one he has written can be acted. I think the contract definite and certain, and capable of being carried into effect. Although it does not provide for all the details, it is probable that no more definite contract could have been made at the time. It contemplated the finding of a person to play the part, and of a manager to produce the play. In the nature of things, no

House v. Clemens.

specific time could be fixed for either occurrence. If a further and other contract were necessary when these things should concur, yet the original agreement could be enforced.

In the case of *England v. Curling*, (8 Beav. 129), certain persons, desiring to enter into a copartnership, caused a draft of their agreement to be prepared, and signed it with their initials, not intending it as a final agreement, nor as containing all details, but contemplating the preparation and execution of a formal copartnership deed. Such a deed was drawn, but never executed, because the parties could not agree upon all of its provisions; yet they went on and began business, though the full arrangement of details was never completed. The court enforced the agreement to the extent of enjoining one copartner from entering into business with other persons during the partnership term, although it was conceded, in the language of the court, to be "impossible to make persons who will not concur carry on a business jointly for their common advantage." It was also held to be of no consequence that the details of the business had not been agreed upon, because, as the court says, "a copartnership agreement is open to variation by the parties from day to day." What could better describe the state of the agreement between these parties, Mr. House and Mr. Clemens? From the nature of their projected undertaking, any agreement that they made as to details was likely to be varied from time to time, and any stipulations as to such details might, therefore, properly be left to the future. If the contract between plaintiff and defendant is one which can be specifically performed by the latter, then the plaintiff is entitled to maintain an action to compel such performance, if he has no adequate remedy at law. That the contract can be specifically performed is conclusively shown by the arrangement which Mr. Clemens has made with Mr. Frohman for putting Mrs. Richardson's dramatization upon the stage, performances under such arrangement having been for some time past successfully given. That the plaintiff has no adequate remedy at law is clear. An action for

House v. Olemens.

damages will afford him no relief. It would not be possible to ascertain what sum plaintiff should have for a breach of the defendant's contract. There is no basis for estimating what profits would accrue from the performance of plaintiff's dramatization, and therefore no basis exists for computing damages. It is undoubtedly true that the court cannot practically enforce the performance of this contract by compelling defendant to put plaintiff's dramatization on the stage; but where the remedy by injunction will do substantial justice, by obliging the defendant to carry out his contract, or to lose all benefit of the breach, equity can thus enforce it. In the case of *Singer Manuf. Co. v. Union Button-Hole, &c. Co.* (6 Fish. Pat. Cas. 480), the subject was fully discussed. In that case defendant's company was the owner of a patent for machines for making button-holes, and had a factory for turning out such machines. In order to secure a market for their product, they made a contract with the plaintiffs, constituting them exclusive agents for the sale of these machines, and agreed to furnish plaintiffs with them, as called for, up to the full capacity of the factory, at an agreed price. After the plaintiffs had bought and paid for a thousand machines, and had succeeded at much labor and expense in selling them and creating a demand, the defendants became dissatisfied with their own bargain, and refused to deliver any more machines to plaintiffs, and began measures to dissolve their association so as to evade their contract, and they conveyed all their patents to a third party as trustee for another association. The court (U. S. Circ., Dist. Mass.) entertained a suit brought by plaintiffs to compel defendants to perform their contract, and to enjoin them and the third party (who knew of plaintiffs' rights) from manufacturing machines, except for the plaintiffs. It was broadly stated in the decision that, even if the plaintiffs were not entitled to a decree for specific performance, if the court could not order a contract for the making of button-hole machines to be specifically performed by reason of the impossibility of superintending the details of

House v. Clemens.

such a business, yet an injunction to restrain the manufacture of such machines for other persons than the plaintiffs might be ordered. The court cited the cases of *Lumley v. Wagner* (1 De Gex, M. & G. 616), where a singer was enjoined from singing at another theatre, although there was no way to oblige her to sing at the plaintiff's theatre, where she was under contract; and the case of *De Mattos v. Gibson* (4 De Gex & J. 276), where the use of a ship contrary to the charter agreement was enjoined; the case of *Hooper v. Brodrick* (11 Sim. 47), where, although the court could not force the defendant to keep an inn on certain demised premises, as he had agreed to, it enjoined him from doing anything to prevent such use; the cases of injunctions against actors, authors, and publishers, where specific performance of contracts could not be enforced except by injunction (*Webster v. Dillon*, 5 W'kly Rep'r 867; *Stiff v. Cassell*, 2 Jur. N. S. 348); and the case of *Dietrichsen v. Cabburn*, (2 Phil. Ch. 52), in which defendant, who had appointed plaintiff his wholesale agent for the sale of his patent medicine, and agreed to supply him with all he ordered at 40 per cent. discount, was enjoined from selling to any others. The court held it to be established that if the remedy at law is inadequate, and the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract, or lose all benefit from the breach of it, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, though it may be unable to enforce a specific performance. The doctrine was considered established in *Montague v. Flockton* (L. R. 16 Eq. 189), and followed in this country in *Daly v. Smith* (38 N. Y. Super. Ct. 158), and since in many cases, so that it is no longer open to question. In *Glassington v. Thwaites* (1 Sim. & S. 124), plaintiff, who was a partner with defendants in the publication of a newspaper called the "Morning Herald," sued to restrain the use by defendants for a rival publication, "The English Chronicle," in

House v. Clemens.

which they alone were interested, of the effects of the former copartnership. The court said: "The principles of courts of equity would not permit that parties bound to each other, by express or implied contract, to promote an undertaking for the common benefit, should any of them engage in another concern which necessarily gave them a direct interest adverse to that undertaking."

Upon these authorities the right of the plaintiff to an injunction restraining Mr. Clemens from engaging in or promoting or authorizing the performance of a dramatization (by any other person than the plaintiff) of "The Prince and the Pauper" is clear, because such action on defendant's part is adverse to the joint undertaking between him and the plaintiff for the writing and production of a dramatization of defendant's book. It is shown that Mrs. Richardson and Mr. Frohman, the other defendants, had sufficient notice of the plaintiff's rights to entitle the latter to include them in the injunction against Mr. Clemens. Mrs. Richardson was informed by Mr. Clemens that the plaintiff had done some work upon the play, and this was sufficient to put her upon inquiry. Defendant Frohman appears to have been expressly informed of plaintiff's rights. In the agreement made by the defendants among themselves for the production of Mrs. Richardson's dramatization there is a stipulation concerning possible claims on the part of any other person, and it is evident they contemplated the plaintiff's claim, and none other. The motion for an injunction should be granted, with \$10 costs.

Motion granted, with \$10 costs.

Anderson v. Cullen.

MARY ANDERSON, Appellant, *against* WILLIAM CULLEN,
Respondent.

(Decided February 10th, 1890.)

An action will not lie against a husband to recover for moneys loaned his wife to buy necessaries.

A husband is not liable for necessaries furnished his wife after she has obtained a limited divorce, though the decree does not award her alimony; especially where the person furnishing the necessaries had knowledge of the proceedings for divorce, and did not give credit to the husband.

APPEAL from a judgment of the District Court in the City of New York for the Eighth Judicial District.

The facts are stated in the opinion.

Donohue, Newcombe & Cardozo, for appellant.

Stephen C. Baldwin, for respondent.

BOOKSTAVEN, J.—In the court below, the plaintiff tried the action on the common law doctrine that a husband is bound to supply necessaries for his wife, and if he failed to do this, she could procure the same on his credit, and that the persons furnishing them could maintain an action for their value against the husband. This doctrine proceeds upon the theory that credit for such purchases is given to the husband, but the complaint in the action avers that the plaintiff, at the request of the wife, loaned or advanced to her the sum of fifty dollars to enable her to pay for these necessaries, which it alleges the husband had refused to furnish, and that the money was so spent. This negatives any idea of credit being given to the husband; it was given

Anderson v. Cullen.

to the wife and not to him. Since 1884 (L. 1884 c. 381,) a married woman has been empowered to make all contracts, the same as a *feme sole*.

In the many cases decided in this state affirming the wife's right to contract debts for necessities in her husband's name, we do not find any in which a recovery was permitted for moneys loaned to her to buy such necessities, but the contrary has been expressly held in England and in states adopting the common law (*Knox v. Bushnell*, 3 C. B. N. S. 334; *Paule v. Goding*, 2 Fost. & F. 585; *Jenner v. Morris*, 3 DeGex, F. & J. 45, 52; *Zeigler v. David*, 23 Ala. 127, 138; *Gilbert v. Plant*, 18 Ind. 308); and we think the complaint might well have been dismissed in the court below upon this ground.

But in that court the defendant set up, as a defense to the action, that Eliza Cullen, the wife of defendant, had commenced divorce proceedings against him in 1883, in the Superior Court of this city, and there obtained a divorce *a mensa et thoro*. In granting the decree, the court for some reason declined to award her alimony, but inserted at the end of the judgment a provision that, in the event of the pecuniary circumstances of the defendant becoming materially changed, an application might be made on the foot of the judgment for such modification of the judgment touching the support of the plaintiff as might be just. In 1887, Mrs. Cullen made such a motion, which was granted at special term, but upon appeal that order was reversed at general term, on the ground that the court had no jurisdiction to award alimony after a final decree had been entered. This decision was clearly right, under *Kamp v. Kamp* (59 N. Y. 212), and *Erkenbrach v. Erkenbrach* (96 N. Y. 456). The latter case arose in this court, although erroneously reported to have been a proceeding in the Supreme Court, and was for a divorce *a mensa et thoro*, and the general term of this court held that there was no power to grant alimony to the wife after the final decree, although they allowed a provision for the support of the children. On an

Anderson v. Cullen.

elaborate review of the legislation in regard to this matter, and the various decisions under it, the Court of Appeals affirmed the order as made by this court.

But the appellant contends that, notwithstanding this, the husband is still liable for necessities furnished his divorced wife. In *Griffen v. Griffen* (47 N. Y. 134), it is said, "The wife, when abandoned by her husband, if she does not resort to an action for divorce, must rely upon the right which the common law gives her to obtain necessities on his credit;" thus implying that, if she does resort to an action for divorce, she cannot rely upon that common law right, for she has made her election to proceed under the statute, and all questions that might have been determined in that action, including the right of support, are concluded. And the same thing is implied in *Erkenbrach v. Erkenbrach* (*supra*). It is well settled that an allotment of alimony in a divorce proceeding relieves the husband from any liability for necessities furnished the wife; and we think it is equally true that, where no allotment of alimony is made in view of all the circumstances of the case, the husband is also relieved from paying for necessities procured by the wife. However this may be as to parties entirely ignorant of the divorce proceeding, we think it is certainly true as to the plaintiff in this action, who admitted on the trial that she knew the divorce proceeding had been instituted by the wife, that she was living separate and apart from her husband, and that she did not know the husband, from which it follows that she could have given no credit to him.

We think, therefore, the judgment should be affirmed, with costs.

BISCHOFF, J., concurred.

Judgment affirmed, with costs.

Anderson v. Hamilton.

EDWARD F. ANDERSON *et al.*, as Executors and Trustees of George W. Bassett, deceased, Appellants, *against* WILLIAM G. HAMILTON, as Assignee for Benefit of Creditors of Yukuro Niwa, Respondent.

(Decided February 10th, 1890.)

Where, by a lease, the rent of the demised premises is payable monthly in advance, an assignee for the benefit of creditors of the lessee under an assignment executed after the first day of a month, who thereafter occupies the premises in carrying on the business of his trust, is not liable for the rent of such month or any part of it.

APPEAL from a judgment of a General Term of the City Court of New York affirming a judgment of that court in favor of defendant.

The facts are stated in the opinion.

G. S. P. Stillman, for appellants.

George S. Coleman, for respondent.

LARREMORE, Ch. J.—Defendant's assignor was lessee of premises 47 Barclay Street from plaintiffs, under a written lease requiring payment of rent in monthly installments in advance. The assignment was made on January 5th, 1889, and defendant qualified as assignee January 15th. No rent has been paid for the month of January, 1889, which fell due January 1st. The present action is brought to compel defendant to pay such rent for January, or at least from January 5th, when the assignment was made. It appears that defendant occupied the premises during January and used them in carrying on the business of his trust.

The assignment in question under its general clauses transferred and set over the lease of the premises to the assignee as an asset. The assignee therefore became vested with the lease, entitled to its privileges, and liable on its

Anderson v. Hamilton.

covenants. There was no covenant requiring him to pay rent for January. The January rent became due on January 1st, while the assignor was still the lessee. Consequently the assignor became liable for the January rent, and the amount of it is provable as a claim against the assigned estate. The fatal difficulty of plaintiff's attempt to make the assignee pay for use and occupation during January, at the rate of the rent reserved in the lease, is that such claim for use and occupation is inconsistent with the continued existence of the lease. The lease, together with the possession, passed to the assignee, and his possession continued under the lease. Of course plaintiff had the option of annulling the lease at any time by dispossession proceedings, but as these were not instituted, and the lease was not cancelled or surrendered, the same remained alive and operative during January, and the rights and duties of all parties are prescribed by it. Substantially the above view has been taken by very respectable authorities (*Pibzmayer v. Walsh*, 2 City Ct. Rep. 244; Bishop on Insolvent Debtors, p. 330).

It seems to me, also, that the practical result reached by the above reasoning from abstract legal principles, is just, and in accord with common sense. There is no good reason why the landlord's claim for the month's rent should always be made a preferred one, which would be the real effect accomplished by holding the assignee personally liable. There is no hardship in compelling the lessor to come in with the other contract creditors as to any rent due when the assignment is made. As for rent subsequently to accrue, the summary process of ejectment enables the owner either to bring the assignee to his terms, or to promptly repossess himself of his premises.

The judgment appealed from should be affirmed, with costs.

BISCHOFF, J., concurred.

Judgment affirmed, with costs.

Beatty v. Thilemann.

JANE BEATTY, as Administratrix, &c., of Robert Beatty, Respondent, *against* FREDERICK THILEMANN, JR., Appellant.

(Decided February 10th, 1890.)

Under a requisition from the department of public works in New York City to "furnish and deliver to bureau of chief engineer, . . . necessary labor, material, and take up and relay water mains, . . . to be done under direction and to the satisfaction of the chief engineer of the Croton aqueduct," defendant furnished men and materials for the work, and was reimbursed by the city for the materials and the wages of the men which he paid in the first instance. The men furnished were entirely under the control of the city's inspector, who was authorized to discharge such as were found incompetent, and who directed them as to time, place, and mode of doing the work, and the means to be employed. *Held*, that the relation of master and servant did not exist between defendant and the men employed, and for negligence in the performance of the work, resulting in an injury to a workman, defendant was not liable.

APPEAL from a judgment of this court entered upon the verdict of a jury and from an order denying a motion for a new trial.

The facts are stated in the opinion.

Elbert Crandall, for appellant.

Martin J. Keogh, for respondent.

BISCHOFF, J.—This action was commenced by Robert Beatty, and resulted in a judgment in his favor. Subsequent to the entry of judgment plaintiff died, and the proceedings were continued by his administratrix. The facts appearing upon the trial are briefly stated as follows: On or about September 15th, 1887, the mayor, aldermen and commonalty of the City of New York, through the department of public works, undertook the building of a sewer on West Fifteenth Street between Tenth and Eleventh Avenues. In the prosecution of that work it was necessary to take up and relay certain water mains. On September 15th, 1887, the commis-

Beatty v. Thilemann.

sioner of public works issued a requisition directed to the defendant, as follows :

Department of Public Works,
31 Chambers Street, New York, September
15th, 1887.

“ F. Thilemann, Jr.

“ Please furnish and deliver to bureau of chief engineer, chargeable to repairing and renewal of pipe, stopcocks, &c., necessary labor, material, and take up and relay water mains on Fifteenth Street, between Tenth and Eleventh Avenues, rendered necessary for building sewer in said street, to be done under direction and to the satisfaction of the chief engineer of the Croton aqueduct, for and on account of the department of public works ; and send bill with triplicate, and this order and receipt attached, to Room No. 7, this office.

“ I certify to the necessity of the above work or supplies and that the expenditure therefor has been duly authorized and appropriated.

“ A certificate of the necessity of the above expenditure was placed on file in this department before the expenditure was incurred.

“ [Signed] D. LOWBER SMITH,
Deputy & Acting Commissioner, D. P. W.

“ Page No. 309.

(On margin) “ Requisition Sept. 14, 1887.

“ G. W. Birdsall, Chief Engineer.”

Acting upon this requisition defendant supplied certain material and furnished the workmen engaged in the work. On October 7th, 1887, certain of the workmen were engaged in cutting a hole in one of the pipes required for the purposes of the work, using a hammer and chisel for such cutting, and while plaintiff was passing or standing by, a “ chip ” or piece of the pipe flew off, striking plaintiff’s eye, and destroying its sight. James Duane, a witness for plaintiff, and an engineer employed in the department of public

Beatty v. Thilemann.

works, on cross-examination admitted that it had been the practice of the department of public works, for many years, to issue requisitions such as the one above set forth, and that workmen thus furnished were at once taken charge of by an officer of the department called an inspector, who was placed in charge of the work, at once assumed control of the men, was authorized to discharge such as were found incompetent, and who directed them as to the time, place, manner and mode of doing the work and means to be employed, and that the particular work referred to in the above requisition was in charge of an inspector named James Coleman. Coleman, also called as a witness for plaintiff, admitted that he was an inspector and authorized by the department of public works to assume charge of the work in question, which he did; that he assumed control of the workmen supplied by the defendant, that such workmen were thereafter exclusively under his direction and control, that defendant gave no directions whatsoever in the performance of the work, but that the time, place, mode, manner and means of doing the work were directed by him (Coleman). Defendant, called as a witness on his own behalf, substantiates Coleman's testimony. It should also be noted that Coleman says that immediately prior to the occurrence of the accident he had directed the men cutting the pipe to desist from using a "dog chisel," that he procured a "diamond point" and "caulking hammer" and directed that the further cutting should be done with these, and that while using the "diamond point" and "caulking hammer," the plaintiff was injured in the manner stated. It also appears that defendant paid the workmen for their services, that he rendered statements to the department of public works for such services rendered and materials supplied, and that he received payment therefor.

All of the above facts were without the slightest contradiction, and when the testimony closed, defendant's counsel moved that the complaint be dismissed, on the ground that the workmen through whose fault or negligence the accident

Beatty v. Thilemann.

occurred were the servants of the city, and not of the defendant, that the relation of master and servant had not been shown to have existed between the defendant and such workmen, and that therefore no liability of the defendant could be predicated upon the negligence or carelessness of such workmen. This motion was denied, and defendant's counsel duly excepted. The court thereupon charged the jury, assuming such workmen to have been defendant's servants, and instructing the jury that, for the carelessness or negligence of such workmen, if such was found to have existed, the defendant was liable. Defendant's counsel requested the court to charge that if the city exercised power of control of the work and retained the right to exercise such power during the progress of the work, defendant was its servant, and not its contractor, and that in that case the workmen were the servants of the city and not of the defendant; that, although defendant furnished the workmen, yet if the latter in doing the work were under the direction and control of the city as to the mode and means by which such work was to be accomplished, defendant was not an independent contractor and was not liable for the acts of such workmen done in pursuance of the directions of the officers of the city. These requests were all refused, and such refusals were duly excepted to by defendant's counsel.

The jury thereupon found for plaintiff in \$4,000, and defendant moved for a new trial upon the minutes and the grounds specified in section 999 of the Code of Civil Procedure. This motion was also denied, and from the judgment entered upon the verdict and order denying a new trial defendant has appealed to this court.

The learned judge before whom this case was tried erred in his denial of defendant's motion to dismiss the complaint, and in his refusal to charge as requested. The relation of master and servant did not exist between the defendant and the men employed in the construction of the sewer and the taking up and relaying of the watermain. "If the injured party attempts to recover for his loss against any one

Beatty v. Thillemann.

other than him who is actually guilty of the wrongful act, it can only be on the ground that the relation of principal and agent, or master and servant, existed between the party sued and the party doing the act." (JEWETT, J., in *Pack v. Mayor, &c.*, 8 N. Y. 225). In the present case, there is no proof of such relation. Defendant supplied certain material and the workmen required in the performance of the work. Among such workmen were the men for whose carelessness he is sought to be held liable. It appears that he paid these men for their services in the first instance and was subsequently reimbursed by the city. There is, however, no evidence that, acting under the requisition addressed to him, he went beyond supplying the inspector with men and materials. He nowhere appears to have assumed or undertaken the performance of the work himself. The uncontradicted testimony of two employes of the department of public works shows that the department itself, through its inspector, was in charge of the work; that it assumed entire control of the men; could terminate their employment by discharge; and directed them, not only in the performance of all the details of the work, and the manner and mode of doing it, but also in the use of the very tools employed by the men at the time of the accident complained of. The defendant, on the other hand, from the time he supplied the inspector with the workmen he was called upon to supply, ceased to exercise any further control over them. He does not appear to have participated in the performance of the work, and gave no direction whatsoever regarding the means or manner of doing it. He could not have retained the men if the inspector chose to exercise his authority to discharge them. The case of *Kelly v. Mayor, &c.*, (11 N. Y. 432), and the cases following that, must be distinguished from the present, in that a different state of facts is here presented. In the case last cited, the defendant had made a contract to do certain *work*, according to certain specifications, under the supervision and direction of one of the city's officers, and, says SELDEN, J., "The object of the

Beatty v. Thillemann.

clause relied on was not to give the commissioner of repairs, and the other officer named, the right to interfere with the workmen and direct them in detail *how* they should proceed, but to enable them to see that every portion of the work was satisfactorily completed. It authorized them to prescribe *what* was to be done, but not *how* it was to be done, nor *who* should do it." The very features absent in that case, and upon the absence of which the court dwelt as proof of the fact that the men employed were not the servants of the city, exist, however, in the present case. The defendant does not appear to have sustained any other relation to the work in question than that of the medium through which the department of public works procured its supply of labor and materials required by it in the performance of work assumed and undertaken by it. The fact that the men employed were paid by defendant for their services might, in the absence of evidence negating the relation of master and servant, be accepted as some proof of employment, but it is by no means the determining test. If one person is under the immediate direction and control of another who may terminate such control by discharge, and direct him *what* work to do, when to do it, how to do it, and to designate the means to be employed in doing the work, the relation of master and servant between these persons is complete, and the fact that the services are paid for by another is of no importance. No precise rule can be laid down which would be applicable to all cases. Whether or not one person was the servant of another must be determined by the facts of the particular case, after applying thereto the tests above mentioned, and, applying these tests to the facts of the present case, the conclusion is irresistible that the workmen employed were the servants of the city and not of the defendant, and for the carelessness of such workmen, the city, therefore, and not the defendant, must be held answerable.

This view renders the discussion of the appellant's remaining points unnecessary.

Carstens v. Schmalholz.

The judgment and order appealed from should be reversed, with costs to abide event, and a new trial ordered.

BOOKSTAVEN, J., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

HENRY CARSTENS, Respondent, *against* THEODORE SCHMALHOLZ, Appellant.

(Decided February 10th, 1890.)

An agreement of settlement made by the attorneys in an action, with the full knowledge and consent of the parties, is binding as to matters in dispute, not embraced in the action, which are included in such agreement.

APPEAL from a judgment of the District Court in the City of New York for the Eighth Judicial District.

The facts are stated in the opinion.

Freeman & Green, for appellant.

J. Fennell, for respondent.

BOOKSTAVEN, J.—The plaintiff sued, as assignee of one Hepke, to recover the value of work done by his assignor upon a buggy and cart belonging to the defendant. Before this action was brought, Hepke sold defendant a wagon and repaired carts for him, and, the bill being disputed, sued in the City Court to recover the purchase price and value of these vehicles, but did not include in that action the work done upon the buggy and cart now sued on. While the action in the City Court was pending, the attorneys for the parties, with their full knowledge and consent, made a written agreement settling all their differences, including the cause of action now sued on. Hepke having ignored this

Carstens v. Schmalholz.

written agreement, defendant, by leave of court, pleaded it by way of supplemental answer, and upon the issues thus raised a trial was had in the City Court, where Hepke recovered a judgment, which was appealed from and afterwards reversed. Whatever rights were conferred upon the plaintiff in this action by Hepke's assignment were subject to all the equities between the assignor and the defendant (*Ingraham v. Disborough*, 47 N. Y. 421). The agreement entered into by Hepke and the defendant through their attorneys not only settled the action in the City Court but also settled this cause of action as well; therefore, if that agreement was a valid one, this action cannot be maintained.

The respondent contends that it was not valid because made by the attorneys and not by the parties, and that they cannot bind their principals for anything outside of the matters then in suit in the City Court. In this we think he is mistaken. The evidence is quite sufficient to show that, although the agreement was made by the attorneys, it was with the full knowledge and consent of the principals, given by them both before and after the agreement was executed, and that it was intended as a final settlement of all of the matters in controversy in the action, and not of those then in suit only. Such an agreement we think a valid and binding one; all the causes of action covered by it are merged in that agreement, and all the rights of the parties must be determined by it. The agreement was not a stipulation to settle an action, merely; it was a new contract, which settled the pending action and all other differences of the parties, including the one now under consideration. An accord unperformed, consisting of mutual promises, and thus having a new consideration, is binding upon the parties, and an action will lie for the breach of it (2 Parsons on Cont. 195). Where mutual promises give a right of action, there is an accord and satisfaction, for an accord with mutual provisions to perform is good, though the thing be not performed at the time of the action, for the party has a remedy

Chemical National Bank v. Colwell.

to compel performance (*Davis v. Spencer*, 24 N. Y. 386, 390). Where a new agreement has been accepted, the original cause of action is merged and extinguished (*Morehouse v. Second Nat. Bank*, 98 N. Y. 503-9). The law favors compromises, and will hold parties concluded by their agreement to compromise, when there is no fraud (*Vosburgh v. Teator*, 32 N. Y. 561; *Magee v. Badger*, 30 Barb. 246, 263; *Steele v. White*, 2 Paige 478). That the claim in this action was in dispute was beyond controversy, and that the parties had other disputes is apparent from their agreement. They settled all their disputes, those involved in and those outside of this litigation. The plaintiff, on receipt of the sum named, was to fully satisfy and discharge all claims and demands. When, under such an agreement, an act precedent is to be done by plaintiff, he cannot have an advantage by his failure to perform (*Morehouse v. Second Nat. Bank*, *supra*).

That the plaintiff did not comply with the condition precedent to his recovery, we think undisputed, as shown by the opinion of the General Term of the City Court in *Hepke v. Schmalholz*.

We think, therefore, that neither the plaintiff nor his assignor can maintain this action against the defendant, and that the judgment should be reversed, with costs.

BISCHOFF, J., concurred.

Judgment reversed, with costs.

THE CHEMICAL NATIONAL BANK OF NEW YORK, Respondent,
against AUGUSTUS W. COLWELL, Impleaded with De Witt
C. Wheeler *et al.*, Appellant.

(Decided February 10th, 1890.)

A by-law of a limited liability company providing that the president shall make, sign, and execute all contracts in the name of the company, makes him general agent of the company, with power to transact all business that the company could lawfully do, and implies the

Chemical National Bank v. Colwell.

power to make such negotiable paper as is necessary or convenient in the business of the company, notwithstanding another by-law declares that all notes shall be signed by the treasurer; the by-laws being contradictory in other particulars.

A note made by a limited liability company to its own order and indorsed by it, and presented for discount by a director twenty days from its date, does not on its face suggest that it is accommodation paper, nor that it is used for a dishonest purpose.

Defendant, on executing an assignment in blank of all his stock in a limited liability company, of which he was director, to another director, told the latter that he severed all his connection with the company and would have nothing further to do with it. *Held*, that such declaration, not accompanied with any request to communicate it to the board of directors, was not a valid resignation.

Before the transfer of defendant's stock was made on the books of the company, he consented to retain five shares, on the suggestion that it would be bad policy for him to leave the company entirely, and a new certificate for such five shares was issued to him. *Held*, that he had not ceased to be a director under the requirements of section 10 of the limited liability companies act of 1875, that "directors shall be stockholders to the extent of at least five shares."

APPEAL from a judgment of this court entered upon a verdict directed by the court and from an order denying a motion for a new trial.

The action was brought against the directors of the New York Lumber Auction Company, Limited, to charge them, on their statutory liability for the debts of the company for failure to file an annual report, with the amount of a promissory note for \$2,200 made July 2d, 1886, by the company, to its own order, and indorsed by the company and by L. E. Jones and B. L. Luddington, and discounted at plaintiff's bank, the proceeds being placed to the credit of L. E. Jones' individual account. Defendant Colwell set up as defenses that he ceased to be a director November 5th, 1885, and that the note was not a valid note, not being signed by the treasurer of the company. The court directed a verdict for plaintiff. Defendant Colwell moved for a new trial, and on the hearing of his motion at the Special Term, the court delivered the following opinion.

Chemical National Bank v. Colwell.

VAN HOESEN, J.—I think that the plaintiff is entitled to judgment on the verdict.

This case differs from those on which the defendant relies. The statute (§ 10) provides that the business shall be managed by a board of directors, and “by such officers, to be elected from the directors, as the by-laws shall prescribe.” The by-laws preclude the idea that the ordinary business of the company was to be managed by the board of directors, for they provide that the directors shall only meet semi-annually, unless the president or the secretary shall call a special meeting. They then provide that the president shall *make*, sign and execute all contracts in the name of the company. He is not merely to sign and execute, he is to make all contracts. This clause makes the president the general agent of the company, with power to transact all business that the company could lawfully do. It implies, if it does not expressly confer, the power to make such negotiable paper as was necessary or convenient in the business of the company.

There is another clause of the by-laws which declares that all notes shall be signed by the treasurer, but I do not regard that as tantamount to a declaration that a note shall not be valid unless the name of the treasurer be signed to it. The by-laws are in several places contradictory, for one clause provides that the corporate seal shall be attached only to certificates of stock unless special directions to the contrary be given by the president or the treasurer, and the clause makes it the duty of the secretary to attach the seal to all contracts.

I believe that the president had the right, without the authority of the board of directors, to make contracts, and to make the contract that is the subject of this action.

There is nothing in the evidence to show that the contract is one that the president ought not to have made, though there is evidence that the money obtained upon the note was used by one Jones, who was a director of the company, for his own private purposes. The fact that Jones was a

Chemical National Bank v. Colwell.

director of the company, and that the proceeds of the note were applied by him to his own use, does not show that the note was made for his accommodation, nor did the possession of the note by him naturally give rise to the question as to whether he was not confederating with the president of the company to make an improper use of the credit and the paper of the company. The note was signed: "New York Lumber Company, Limited, D. C. Wheeler, Pres.," and was drawn to the order of "New York Lumber Co., lim.," and it was indorsed exactly as it was signed. Such a note so indorsed, though presented for discount by a director of the company twenty days after it bore date, did not, upon its face, suggest that it was an accommodation note; nor did the possession of it by a director argue that it was used for a dishonest purpose. If, in point of fact, the proceeds of the note went into the company business; or, if the note, after having been used in the business of the company, had found its way into the hands of a director (and the bank had nothing before it to show that either state of affairs was unlikely), what reason was there why it should not be discounted?

The so-called resignation of the defendant did not terminate his duties as a director. It was never accepted (Boone on Corporations, § 136; Angel & Ames, §§ 433, 434); nor do I think that he absolutely and irrevocably resigned, though he talked of resigning. No successor had ever been chosen, nor had the resignation ever been brought to the notice of the board. His term had not expired by its own limitation. There should be judgment on the verdict.

From the judgment entered on the verdict in accordance with this opinion, and from the order denying his motion for a new trial, defendant Colwell appealed.

J. Alfred Davenport and Edward C. Perkins, for appellant.

Chemical National Bank v. Colwell.

Jones & Roosevelt, for respondent.

LARREMORE, Ch. J.—I concur in the conclusion reached by Judge VAN HOESEN, and in the reasons assigned by him in his opinion, filed upon the denial of defendant Colwell's motion for a new trial. It will be unnecessary to further consider the questions which are fully discussed in such opinion. It may be well, however, to pursue the discussion a little further on the questions of appellant's alleged resignation as a director, and the transfer of his stock in the "New York Lumber Auction Company, Limited." Accepting the version of the transaction supplied by appellant's witnesses, the facts are as follows: On the 5th day of November, 1885, appellant said to Latimer E. Jones, the secretary and treasurer, at the office of the company, at the time of executing an assignment to said Jones individually of the 80 shares of stock which appellant then owned:—

"Now, Jones, that severs all my connection with the Lumber Auction Company; I have got nothing further to do with it; you have got father's stock; he is dead, and that settles that; and I have given you mine, and that clears up all that; and I have nothing further to do with the company."

Mr. Jones was appellant's brother-in-law, and the above conversation is what appellant relies on to establish a resignation. Appellant admitted that he did not tell Mr. Jones to communicate his resignation to the board of directors, saying, however, that he had told Mr. Jones previously that he wished to resign.

Granting that the right of a director to resign is absolute, and admitting that no writing, and no particular form of words is essential, it is nevertheless true that any communication, in order to constitute a valid resignation, must express a definite and present intention to withdraw from the office in question, and must be addressed to the company, or the board of directors, or to an officer, as such, with the explicit purpose of having it reach the company or

Chemical Nat. Bank v. Colwell.

board of directors through him. I do not think the facts relied on to establish a resignation here are as strong as they were in *Kindberg v. Mudgett* (24 N. Y. Week. Dig. 229). In that case it appeared that the defendant had stated orally to several trustees that he would have nothing more to do with the company, besides writing a note to that effect to one of them. Yet, even under those circumstances, the court held that defendant's declarations could not be construed as a resignation.

Appellant further contends that he ceased to be a director, under section 10 of the act, because, on November 5th, he executed an assignment of all the stock he held to Jones. The facts are that he executed such assignment in the blank upon the back of his certificate on November 5th, but that the actual transfer on the books was not made until November 14th, when 75 of the shares were transferred to Jones, and a new certificate for the remaining five shares was made out in appellant's name. Appellant's witness, Atchison, says on this point:

"I suggested to Mr. Jones that it would be bad policy for Mr. Colwell to leave the company entirely, and that he persuaded him to accept the requisite number of shares to remain as a director, which was afterwards done."

It does appear that appellant actually took back the certificate for such 5 shares, presumably, as Mr. Atchison testifies, with the intention of remaining a director. The trial judge was therefore justified in inferring that appellant concluded to ratify the act of Jones and Atchison in keeping him eligible for and actually in the board. In contemplation of law I think appellant was the holder of said five shares throughout his term of office. He intended originally to assign all his shares, but only 75 of them actually were transferred, and, as he consented afterwards to retain the five shares which all the time stood in his name, it would be putting a most unnatural and technical construction upon the conceded facts to hold that he was not continuously a stockholder.

Deimel v. Scheveland.

My conclusion is that appellant was legally a director of the corporation at the time of the failure to file the annual report, and of the inception of the debt, and that he is liable as sued in this action.

BOOKSTAVEN and BISCHOFF, JJ., concurred.

Judgment affirmed.

SIMON DEIMEL *et al.*, Appellants *against* DAVID SCHEVELAND,
Respondent.

(Decided February 10th, 1890.)

Affidavits by defendant's bookkeeper and others that defendant had left the state and his business, without leaving any one in charge, and by plaintiff that he had frequently inquired at defendant's place of business and was informed that defendant did not intend to return, will support an attachment as against other creditors of defendant.

A six days' summons issued in an attachment suit in the City Court of New York, instead of a ten days' summons, as required by sub division 2 of section 3165 of the Code of Civil Procedure in case of service of the summons by publication, is not an absolute nullity, and may be amended, under section 723, after publication commenced, and after thirty days from the issue of the warrant, though the summons was not issued until the order for publication was made.

On appeal from an order refusing to vacate and set aside an attachment and a judgment entered in the attachment suit, the court is not limited, in its inquiry into the validity of the proceedings, to the judgment roll, but may consider additional papers.

APPEAL from an order of the General Term of the City Court of New York affirming an order of that court denying a motion to set aside an attachment and judgment.

The facts are stated in the opinion.

Philip Carpenter, for appellant.—The ground of the attachment is fraud, and fraud is never presumed, but strict proof is required. (Penal Code, § 587; *Morris v. Talcott*, 96 N. Y.

Deimel v. Scheveland.

100, 107; *Andrews v. Schwartz*, 55 How. Pr. 190; *Herman v. Doughty*, 15 N. Y. Week. Dig. 94; *Mappes v. Liembach*, 22 N. Y. Week. Dig. 387). The truth of the charge made cannot be assumed upon mere general statements, but it must be fortified and supported by facts. (*Yates v. North*, 44 N. Y. 274; *Fleitman v. Sickie*, 13 N. Y. St. Rep. 399; *Moore v. Becker*, 13 N. Y. St. Rep. 567; *Goldschmidt v. Herschorn*, 13 N. Y. St. Rep. 560; *Ellison v. Bernstein*, 60 How. Pr. 145; *Head v. Wollner*, 53 Hun 616). Statements on information, when it is not shown that the persons from whom the affiant professes to have obtained his information were absent or that their depositions could not be procured, are insufficient to authorize an attachment. (*Yates v. North*, 44 N. Y. 271–274; *Steuben County Bank v. Alberger*, 78 N. Y. 252, 258; *Matter of Stonebridge*, 53 Hun 545, 547; *Wallach v. Sippilli*, 65 How. Pr. 501; *Head v. Wollner*, 53 Hun 616).

Section 3165, sub division 2 of the Code, provides that “where an order directing the service of the summons . . . by publication is granted, the summons must state that the time within which the defendant must serve a copy of his answer is ten days.” It has been repeatedly held that, proceedings for the service of summons by publication being statutory, the requirements of the code in respect thereto must be strictly complied with. (*Kendall v. Washburn*, 14 How. Pr. 380). An attachment is invalidated by the failure to serve or publish the summons within thirty days after issuing the warrant. This is not a mere irregularity, but a jurisdictional omission which works the destruction of this warrant. (*Blossoms v. Estes*, 22 Hun 472, and 84 N. Y. 614, 617; *Taylor v. Troncoso*, 76 N. Y. 599; *Mojarrieta v. Saenz*, 80 N. Y. 547).

The order amending the summons was ineffectual and the attachment was not revived or restored thereby, as the order was made more than thirty days after the attachment was granted and after it had become invalidated pursuant to section 638 of the code. Section 723 of the code authorizes amendments “in furtherance of justice” and not in disregard

Deimel v. Scheveland.

of the "substantial rights" of the appellant, which the same section provides shall not be affected. (*Weeks v. Tomes*, 16 Hun 349; affirmed 76 N. Y. 601). The case of *Gibbon v. Freel* does not apply to the present case. In that case the motion was made by the defendant. He submitted himself to the jurisdiction of the court, and the amendment ordered did not divest him of any rights and he was in no way injured thereby.

Simson Wolf, for respondent.—The insertion of six days instead of ten in the summons did not make it void. (Laws 1875, c. 546; § 3165, subd. 2; *Clapp v. Graves*, 26 N. Y. 418). The summons was amendable. (Code Civ. Pro. § 723; McAdam's Appendix to Marine Ct. Practice, 4; *Gibbon v. Freel*, 93 N. Y. 93).

LARREMORE, Ch. J.—This is an application made by a stranger to the above entitled action, who is also a judgment creditor of defendant, to have the attachment granted to plaintiff herein vacated and set aside, in aid of said outsider's execution upon his judgment. It is argued in the first place that the affidavits upon which the attachment was granted were defective, in that they did not allege sufficient facts to raise an overwhelming suspicion of fraud on defendant's part. I am of opinion that there was enough in the papers to authorize the warrant. Plaintiff alleged that he went to defendant's regular place of business several times to inquire for him, and was there informed by defendant's bookkeeper that defendant had left the state, taking with him all the money he could raise, and that he did not intend to return. This was corroborated by an affidavit of said bookkeeper to the effect that defendant had left the City of New York and his business, and that the same was left without any one to take charge thereof. There were other affidavits averring in a general way that defendant had left the city and his said business. These papers were *prima facie* sufficient. Of course if the defendant had appeared, and explained his

Deimel v. Scheveland.

absence, and repudiated the statements of his bookkeeper, the warrant would have been vacated. Counsel for appellant is in effect arguing, that all the presumptions of innocence, which exist when a defendant moves to vacate an attachment on his own property, should obtain here, when a subsequent lienor is endeavoring to get in ahead of plaintiff. The fact is that since the granting of the attachment the propriety of it has been confirmed by defendant's continued absence. The affidavits raised presumptions that defendant had departed from the state, and had removed property from the state with intent to defraud his creditors. The subsequent course of events has demonstrated that these presumptions were actual facts. This should not be overlooked upon the application to vacate made by an outsider, who has no stronger moral claim than plaintiff, and who is seeking only to discover some technical flaw which will overcome the advantage gained by superior diligence. All that we can consider on the present motion is whether the moving affidavits made out a *prima facie* case, and we have no hesitation in holding that they did.

An order was made directing the service of the summons by publication, and such service was begun within thirty days after the attachment was granted, and continued by inserting the summons in the newspapers named, once a week for four weeks. It was then discovered that such summons was a six days' summons, and not a ten days' summons, as required by section 3,165 of the code, subdivision 2. Thereupon, an order was procured amending such summons by substituting ten days for six days; and, in its amended form, publication was continued six weeks longer. It is evident that the latter four weeks of publication were surplusage on any theory. The first publication of the summons in the amended form was more than thirty days after the granting of the warrant, so that unless the publication of the six days' summons can be held sufficient, the attachment must fall. The question then is whether the publication of the original summons for four weeks, and of the amended summons for two weeks, will satisfy the requirements of the statute. It has been held that

Deimel v. Scheveland.

a six days' summons issued under such circumstances is not void. "The summons was not an absolute nullity. The insertion of six days instead of ten was an irregularity merely. . . . A judgment entered by default after the service of such a summons would not have been absolutely void, but simply irregular or erroneous to be corrected by motion on appeal." *Gibbon v. Freel* (93 N. Y. 93). It is to be noticed that the right to amend in that case was deduced from the general power of amendment inherent in the court. In the case at bar the authority to amend is derived from section 723. Subdivision 2 of section 3165 grants a special power of amendment in cases where the summons has been issued before the granting of the order of publication, evidently having in view actions where one or more defendants have been served personally within the jurisdiction, and it thereafter becomes necessary to serve other defendants by publication. Here the summons was not issued until the granting of the order, and this amendment was not covered by the express language of section 3165. Still, under the general phraseology of section 723, the summons was properly amendable, and it follows that plaintiff, having presented a six days' summons to the court, was ordered to publish it. Up to the time of the order of amendment the six days' summons was "the summons" in the action. It was not void, though irregular. It was a valid process of the court, susceptible of being made perfect by subsequent amendment. Publication of it was compliance with the order of publication, and also with section 638, which requires that service by publication of "the summons" be commenced within thirty days. After the amendment, the six days' summons ceased to be "the summons" in the action, and the ten days' summons took its place. The order of publication still standing, it was required that publication of "the summons," that is to say, of the original summons as amended, be continued for two weeks longer, which was done. Under this view of the matter plaintiff began service by publication of the summons within thirty days from the time of granting of

Deimel v. Scheveland.

the warrant, and such service was made complete by the continuance thereof. All of this seems to me to follow legitimately from the general proposition that a six days' summons is not void. If a six days' summons would be sufficient for valid service without the state, subject to amendment thereof after judgment, as was held in *Gibbon v. Freel* (*supra*), certainly the publication of such an irregular summons for a portion of the six weeks should be held sufficient to sustain the attachment in the case at bar.

It may be objected that the judgment roll in this action does not contain any proof of publication of the original summons for the first four weeks, there being nothing on this subject but the affidavit of the printers as to the publication of the summons in the amended form for six weeks. The missing proof could however be made part of the judgment roll at any time by order, and upon the present determination we are not limited to the bare contents of the judgment roll. This is not an appeal from the judgment, but from an order refusing to vacate and set aside the attachment and such judgment. We can therefore properly consider the additional papers submitted, in which the required proof is supplied.

The order of the City Court should be affirmed, with costs.

BISCHOFF, J., concurred.

Order affirmed, with costs.

A motion for leave to appeal to the Court of Appeals from the judgment entered upon the foregoing decision was made at the succeeding General Term, and the following opinion was rendered April 7th, 1890.

LARREMORE, Ch. J.—After a careful re-examination of the case, I have reached the conclusion that this application should be denied. It does not appear from the affidavit that any statute or decision has been overlooked in the conclusion reached. Neither does it appear that the question

Gerard v. McCormick.

presented is a new one. On the contrary, the propositions presented by the learned counsel for the motion have been frequently passed upon, as shown by the authorities already cited.

The motion is therefore denied, without costs.

BISCHOFF, J., concurred.

Motion denied.

SARAH M. GERARD *et al.*, Respondents, *against* JAMES MCCORMICK, Appellant.

(Decided February 10th, 1890.)

Plaintiffs' agent in the collection of rents of their buildings, known as the "Glass Buildings," borrowed money of defendant for his individual use, and gave his individual property as security. He paid such loan with a check signed with his name followed by "Agent Glass Buildings." *Held*, that this signature was sufficient to put defendant upon inquiry as to whether the check was drawn upon funds of plaintiffs.

The action to recover the amount of such check from defendant was tried upon the theory that the loan was made to plaintiffs' agent, as agent, and not individually. *Held*, that newly discovered evidence to the effect that the check was in fact paid out of the individual funds of the agent, which he had deposited in his agent's account to meet such check, not being germane to the issues, was no ground for a new trial.

APPEAL from a judgment of this court entered upon the verdict of a jury and from an order denying a motion for a new trial on the ground of newly discovered evidence.

The facts are stated in the opinion.

Samuel Fleischman, for appellant.—The action being one for money had and received, it was essential that plaintiffs, in order to recover money, should prove that the money received by defendant was belonging to plaintiffs (*De Peyster v. Winter*, 4 How. Pr. 449: *Nat.*

Gerard v. McCormick.

Trust Co. v. Gleason, 77 N. Y. 403; *Decker v. Salzman*, 59 N. Y. 277).

To enable a principal to recover his money paid by his agent in discharge of the latter's debt, the former must show that the defendant knew that the agent had no right thus to use the money (*Ford v. Union Nat. Bank of Albany*, 13 Week Dig. 352, 25 Hun 564, affirmed 88 N. Y. 672; Story on Agency, § 228; *Justh v. National Bank of the Com.*, 56 N. Y. 478; *Keator v. Smith*, 15 Week. Dig. 6; *Charlotte Iron Works v. American Exch. Nat Bank*, 34 Hun 26; *Le Breton v. Pierce*, 2 Allen, 8; *Laubach v. Leibert*, 87 Pa. 55).

The plaintiffs gave their agent power to draw checks and pay out this money. They are estopped from denying his authority to the prejudice of an innocent third party dealing with him in reliance upon his apparent authority (*Bank of Batavia v. New York &c. R. Co.*, 106 N. Y. 195; *Griswold v. Haven*, 25 N. Y. 595; *New York &c. R. Co. v. Schuyler*, 34 N. Y. 30, 58, 68; *Armour v. M. C. R. Co.*, 65 N. Y. 111; Story on Agency, §§ 227, 228; *North River Bank v. Aymar*, 3 Hill 262).

The drawing of the check by plaintiff's agent was an express declaration that he had authority to check out this money, and the plaintiffs cannot claim that he actually exceeded his authority as against the defendant, who was an innocent holder and gave value for the check (*Amidon v. Wheeler*, 3 Hill 137; *Ely v. Norton*, 2 Abb. Ct.App. Dec. 19; *Stephens v. Board of Education*, 79 N. Y. 183; *School-dist. v. First Nat. Bank*, 102 Mass. 174; *LeBreton v. Pierce*, 2 Allen, 8; *Case v. Banking Assoc.*, 4 Comstock, 166; see, also, *Gray v. Johnston*, L. R. 3 Eng. and Ir. App. 1; *Lime Rock Bank v. Plimpton*, 17 Pick. 159; *Clement v. Leverett*, 12 N. H. 317). The words "Agent Glass Buildings," added to Boswell's name, were but *descriptio personæ*, and defendant had a right to regard the check as Boswell's individual check (*Dewill v. Walton*, 5 Seld. 571; *Pentz v. Stanton*, 10 Wend. 271; *Reznor v. Wood*, 36 How. 353;

Gerard v. McCormick.

Hills v. Bannister, 8 Cowen, 32; *Taft v. Brewster*, 9 Johns, 333). The defendant, having given up security upon receipt of the check, was a purchaser for value (*Bank of Salina v. Babcock*, 21 Wend. 499; *Mohawk Bank v. Corey*, 1 Hill 513; *Bank of Sandusky v. Scoville*, 24 Wend. 115; *Meads v. Merchants' Bank*, 25 N. Y. 143; *Ford v. Union Nat. Bank*, *supra*; *Justh v. National Bank of the Com.*, *supra*).

The new evidence shows conclusively that the defendant did not receive plaintiff's money. A new trial should be granted where the court is of the opinion that the ends of justice will be subserved thereby, without regard to technical rules (*Clegg v. New York Newspaper Union*, 51 Hun 232; *Baylies on New Trials and Appeals*, p. 526; *Bonyne v. Waterbury*, 12 Hun 534).

H. Kettell, for respondents.—The signature to the check, to wit: "William Boswell, Agent Glass Buildings," was sufficient notice to defendant to put him on inquiry (*Carpenter v. Farnsworth*, 106 Mass. 561; *Wright v. Cabot*, 89 N. Y. 574; *Budd v. Munroe*, 18 Hun 316; *Pendleton v. Fay*, 2 Paige, 202; *Anderson v. Alen*, 12 Johns. 343; *Merchants' Bank of Canada v. Livingston*, 74 N. Y. 223; *Moore v. American L. & T. Co.*, 115 N. Y. 65; *Stephens v. Board of Education*, 79 N. Y. 187; *Argersinger v. McNaughton*, 24 N. Y. St. Rep. 16). The words of the signature after the name were not merely descriptive of the person (*Fellows v. Longyor*, 91 N. Y. 331; *Sutherland v. Carr*, 85 N. Y. 110; *National Bank v. Ins. Co.*, 104 U. S. 517).

The defendant, being the one whose acts made the occurrence possible, must bear the loss, and is liable to the plaintiffs (*Wright v. Cabot*, 89 N. Y. 574; *Gloucester Bank v. Salem Bank*, 17 Mass. 43; *Root v. French*, 13 Wend. 572; *Sanford v. Handy*, 23 Wend. 268; *Argersinger v. McNaughton*, 24 N. Y. St. Rep. 20).

It is a familiar rule of law that, to bind a principal, the authority of the agent must be proved, and it is incumbent on defendant to show that Boswell had authority to borrow money (*Bernheimer v. Herrman*, 44 Hun 112; *Central*

Gerard v. McCormick.

Nat. Bank v. North River Bank, 44 Hun 116). The authority of the agent cannot be proved by the agent's declarations nor increased by the agent's acts (*Snook v. Lord*, 56 N. Y. 605; *Marvin v. Wilber*, 52 N. Y. 270; *Eaton v. Delaware &c. R. Co.*, 57 N. Y. 390; *Home Sewing Machine Co. v. Farrington*, 82 N. Y. 127; *Budd v. Munroe*, 18 Hun 317; *Griswold v. Haven*, 25 N. Y. 599; *O'Laughlin v. Hammond*, 21 N. Y. St. Rep. 647; *Briggs v. Davis*, 20 N. Y. 15; 16 N. Y. 134; *Swarthout v. Curtis*, 5 N. Y. 301; *Moore v. L. & T. Co.*, 115 N. Y. 65). Defendant was bound to inquire into the authority of Boswell, and must be presumed to know the limitations of the agent's authority (*Martin v. Farnsworth*, 49 N. Y. 558, and cases cited; *Sage v. Sherman*, Lalor's Supp. 147, affirmed 2 N. Y. 417; *Crane v. Evans*, 1 N. Y. St. Rep. 217, 218; *Argersinger v. McNaughton*, 24 N. Y. St. Rep. 16). The authorities are all in accord that trust funds can always be recovered, unless against a *bona fide* purchaser for consideration without notice (*Weaver v. Bardcn*, 49 N. Y. 286; *Wetmore v. Porter*, 92 N. Y. 81, 84; 91 N. Y. 324; *Van Allen v. American Nat. Bank*, 52 N. Y. 1; *Stephens v. Board of Education*, 79 N. Y. 186; *Smith v. Bank of Com.*, 56 N. Y. 478-484; *Pierson v. McCurdy*, 33 Hun 530, affirmed 100 N. Y. 608; *James v. Cowing*, 82 N. Y. 449; *Falkland v. St. Nicholas Bank*, 84 N. Y. 145; *Baker v. National Exch. Bank*, 16 Abb. New Cas. 458; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; *National Bank v. Ins. Co.*, 104 N. Y. 517; *Duncan v. Jaudon*, 15 Wallace 175; *Shaw v. Spencer*, 100 Mass. 389, 17 Northeast. Rep. 496; *Grand Trunk R. Co. v. Edwards*, 56 Barb. 408).

Conceding that Boswell used the money received for rents, yet when he restored or made good the amount *pro tanto* by depositing other moneys in the trust account, the amounts so deposited were impressed with the trust in favor of the principals and became substituted for the original rents and subject to the same equities (*Van Alen v. American Nat. Bank*, 52 N. Y. 5; *Baker v. New York Nat. Exch. Bank*, 16 Abb. New Cas. 458).

Gerard v. McCormick.

BOOKSTAVEN, J.--The complaint, in effect, alleged that the defendant, on or about the 19th of September, 1882, received the sum of \$501.25, being the money of the plaintiffs, to their use. The answer is, in effect, a general denial, and, as a separate defense, sets up a loan made by defendant, on or about September 19th, 1882, to one William Boswell, as agent for plaintiffs, for their use, of the sum of \$500, which was repaid with interest.

Under these pleadings the plaintiffs proved that they together owned the premises 87 and 89 Wall Street, known as the "Glass Buildings." William Boswell was for many years plaintiffs' agent to collect the rents of these buildings, to deposit the same in bank, pay the taxes, Croton rates, insurance, interest on the mortgage on the premises, and such repairs as the plaintiffs directed to be made on the premises, and to apportion and pay over the net balance to the various owners, which he did by check signed "William Boswell, Agent Glass Buildings." Boswell kept two accounts in the Corn Exchange Bank, one under the name of "William Boswell, Agent Glass Buildings," and the other an individual account in his own name. Boswell had the full confidence of his employers, who had no suspicion that he was not honestly carrying on his agency, until in February, 1887, when he confessed to one of the owners that he had been for a long time misappropriating the rents, and that, among other things, he had during a period of several years retained out of the rents collected by him the money to pay the taxes on the buildings, about \$1,700 per annum, but had not paid those taxes. By reason of this misappropriation he had been at all times indebted to the plaintiffs since the year 1879, and still owed them several thousand dollars. On the trial it appeared that the defendant, who is a stockbroker, loaned Boswell \$500 on or about the 31st of August, 1882. When the loan was made, Boswell deposited as collateral security thereto his individual property. About two weeks thereafter this loan was repaid by a check for \$501.25, signed "William Boswell, Agent Glass Buildings," whereupon the collateral was sur-

Gerard v. McCormick.

rendered to him. The testimony of the defendant, we think, does not show that he looked upon the transaction as a borrowing for the account of the owners, although he so stated in his answer. What he testified to shows that he made the loan in the usual way to Boswell individually, and at the end of two weeks received payment therefor, and he adds that he had, at the time of receiving the check, no idea, and did not suppose that the check represented money belonging to the plaintiffs in this action; that he had no idea other than that the check represented money belonging to Boswell; and further says: "I made the loan with him. He gave me the security, and I gave him the check. And when he returned it I gave him his security, and he gave me the check."

Upon this state of facts two questions only were presented to the jury for their determination, namely, whether the money was plaintiffs', and whether defendant had sufficient notice to put him on inquiry, because it cannot be said that the testimony in any way sustained the defense set up by him in his answer. On both of these questions the jury found in favor of the plaintiffs, and we think the evidence sufficient to sustain such finding.

The appellant contends that the signature to the check, to wit, "William Boswell, Agent Glass Buildings," was not sufficient notice to put him on inquiry, and cites in support of such contention *Ford v. Union National Bank of Albany*, (13 Week. Dig. 352). The case, appearing only in the Digest, is meagrely reported. The action was brought against the bank for debiting a check drawn in proper form against an account kept with one C. F. Norton, Agent, and crediting its amount to another account which it had with C. F. Norton. It does not appear from the report that the bank had any knowledge except what might be inferred from the word "Agent." The court held that the defendant was not liable, because a party must have notice that the money was misappropriated. This decision, doubtless, was based on the fact that the defendant was a bank, and was bound to presume, when a check was drawn in proper form against an

Gerard v. McCormick.

account kept with a depositor as a trustee, that the customer was in the course of lawfully performing his duty, and was bound to honor his check accordingly. On no other theory do we see how that decision could be sustained. In *Baker v. New York Nat. Bank* (16 Abb. New Cas. 458), the Court of Appeals held that the bank was liable, and said: "The bank, having notice of the character of the fund, could not appropriate it to the debt of Wilson & Bro., even with their consent, to the prejudice of the *cestuis que trustent*." It is also reported in 16 Week. Dig. 531, where the general term of the Supreme Court says, "that where an agent deposits the money of his principal in a bank, in an account kept by him as agent, the funds will be regarded as the property of his principal, so far as they remain undrawn by the agent, and the bank will not have the right to apply the same upon the agent's pre-existing individual debt." The words of the signature, after the name, were not merely descriptive of the person (*Fellows v. Longyor*, 91 N. Y. 331). In that case the court says: "These authorities [meaning those which hold that such additions are merely of description] have no application to this case; . . . the question here is that of the ownership of the moneys; . . . the words 'Guardian, etc.,' operated as notice to the defendant Longyor of the rights of the wards of whom Downer was guardian," citing a number of authorities. We are therefore of the opinion that the judgment should be affirmed, with costs.

After the trial, the defendant made a motion for a new trial upon the ground of newly discovered evidence. The case was tried on the theory of the answer that Boswell borrowed of defendant as "agent" of the plaintiffs, and that the money was returned by the check in question. The jury found against the defendant upon this, and the alleged newly discovered evidence was to the effect that the check in suit was paid out of money which Boswell deposited the same day in this account, and that before such deposit there was only nine dollars to Boswell's credit in this account; that the deposit of that date was made from the proceeds of a

Goodman v. Cohen.

loan procured by Boswell by mortgage on his individual property. In other words, defendant wishes to prove that Boswell paid with his own money a loan which, according to the answer and the theory held at the trial, was made to the plaintiffs. This is a manifest inconsistency, and such evidence could not avail the defendant, at least until there had been an amendment to the answer; such evidence is immaterial to the questions raised by the pleadings. Conceding that Boswell used the money received for rents for his own purposes, yet when he restored or made good the amount *pro tanto* by depositing other moneys in the trust account, the moneys so deposited became impressed with the trust in favor of the principals, and were substituted for the original rents and subject to the same equities (*Van Alen v. American Nat. Bank*, 52 N. Y. 5; *Baker v. New York Nat. Exch. Bank*, 16 Abb. New Cas. 458). Besides, it appears from the papers submitted that Boswell was in constant communication with the defendant; the items were plainly written in the various accounts; and we think defendant could, with proper diligence, have discovered this fact, and that the order denying a new trial was proper and should be affirmed, with costs.

BISCHOFF, J., concurred.

Judgment and order affirmed, with costs.

ISRAEL D. GOODMAN, Respondent, *against* JACOB COHEN,
Appellant.

(Decided February 10th, 1890.)

Pending negotiations between plaintiff and insurance companies for the adjustment and payment of a loss by damage to plaintiff's goods by fire, defendant, an "insurance wrecker," orally contracted to purchase damaged goods of plaintiff, for a certain sum, which he agreed to pay to the various insurance companies in certain proportions, they to pay the same to plaintiff with an additional sum as damages. *Held*, that such contract was not within the statute of frauds, as an agreement to answer for the debt, default, or miscarriage of another.

Goodman v. Cohen.

APPEAL from a judgment of this court entered upon the verdict of a jury and from an order denying a motion for a new trial.

Plaintiff suffered a loss by fire on a stock of goods which were insured by several insurance companies. Pending negotiations for an appraisal and settlement by the insurance companies, defendant, an "insurance wrecker," or dealer in damaged goods, who was also appointed to appraise the loss, agreed, as alleged by plaintiff, in order to hasten the matter, to purchase of plaintiff \$500 worth of the goods, payment to be made to the various insurance companies in certain amounts to each, but in case any of such companies were insolvent or had gone out of business, the amount to be paid to it was to be paid directly to plaintiff. The payments were made under the agreement, save as to the sum which was to be paid to the Citizens Insurance Company of Mobile, which was insolvent, and to recover such payment plaintiff brought this action. The jury found a verdict for plaintiff, and a motion by defendant for a new trial was denied. From the judgment for plaintiff entered on the verdict, and from the order denying his motion for a new trial, defendant appeals.

Benno Loewy, for appellant.

H. Joseph, for respondent.

LARREMORE, Ch. J.—The contract alleged by plaintiff is certainly an unusual one. Nevertheless, the jury have found by the verdict that such contract was actually entered into, and the submission of the question of fact to them by the trial judge in his charge was free from error, and eminently fair. This contract, which plaintiff succeeded in establishing, was not void under the statute of frauds. It was for a sale of the damaged goods to defendant, he agreeing to pay the price through the different insurance companies, instead of to defendant directly. The engagement on defendant's part, therefore, was not to answer for the debt, default, or mis-

Grant v. Tefft.

carriage of any of the insurance companies, but related simply to the mode of payment for the goods he had purchased. As to the portion of such sum which was to reach plaintiff through the conduit of the Citizens Insurance Company of Mobile, the clause of the contract providing that in case of the insolvency of any company its proportion should be paid directly to plaintiff applied, and this action is maintainable for such amount, which it does not appear defendant has paid out at all.

Upon plaintiff's theory of the transaction, which the jury have accepted, the obvious consideration for the contract moving from plaintiff was the parting with title in the merchandise in question. The verdict is not against the weight of evidence so as to induce us to interfere with it. The sale was a peculiar one, but, on the other hand, we would not feel called upon to say that defendant was not induced to enter into such an arrangement in order to adjust and terminate a tedious negotiation.

The judgment and order appealed from should be affirmed, with costs.

BOOKSTAVEN and BISCHOFF, JJ., concurred.

Judgment affirmed, with costs.

HUGH J. GRANT, Late Sheriff of the City and County of New York, Respondent, *against* ERASTUS T. TEFFT *et al.*, Appellants.

(Decided February 10th, 1890.)

Persons who, with others, have indemnified a sheriff for selling goods of a judgment debtor, cannot escape payment of their share of expenses incurred by the sheriff in defending an action for conversion of the goods, brought against him by the assignee of the debtor for benefit of creditors, on the ground that they represented to the sheriff, when they signed the bond of indemnity, that they had been preferred as creditors and did not wish to attack the assignment, and subsequently, that they did not wish the sheriff to defend the action for conversion.

Grant v. Tefft.

The payment by a sheriff of a fee to his counsel for defending an action creates a legal presumption, in a subsequent action by the sheriff against his indemnitors, that it was a fair and reasonable charge, which is conclusive unless defendant alleges and proves that it is unreasonable.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered upon the verdict of a jury directed by the court and an order denying a motion for a new trial.

The facts are stated in the following opinion of the General Term of the City Court, rendered by McADAM, Ch. J.:—

“The action is on a bond of indemnity, executed by Tefft, Weller & Co., as principals, and by Andrew J. Shively, Thomas R. Armstrong and Edward H. Branch, as sureties, to the plaintiff, as sheriff of the county. The bond recites the recovery of a judgment by Tefft, Weller & Co. against Adolph Von Der Linden, for \$2,174.73, the issuing of an execution thereon to the sheriff, and that certain personal property, apparently the property of the judgment debtor, was claimed by others. The condition of the obligation was that the indemnitors were to save, keep and bear harmless the plaintiff against any damage, liability, costs, counsel fees, expenses, suits, actions, and the like, that might at any time arise, come, accrue, or happen by reason of the levying, taking, or making sale under such execution of all or any personal property which he might judge to belong to the judgment debtor, or for or by reason of any action that might be brought against him on account thereof. There was also in the hands of the sheriff an execution against Von Der Linden in favor of Abraham Weinberg, for \$469.74, and another in favor of John Claflin and others for \$3,988.39. In each of these actions a bond of indemnity similar in form, executed by the plaintiffs in said actions as principals, and by others as sureties, was given to the plaintiff as sheriff.

“A sale of certain property levied on was had and the various executions were paid in full. James J. Byrne, as general assignee of the judgment debtor, claimed title to the property, and brought action against the plaintiff to recover

Grant v. Tefft.

damages by reason of the levy thereon and sale thereof. The action was defended, tried twice; the jury on each trial disagreed, and the action was thereafter discontinued. The plaintiff paid his counsel for defending that action \$1,000, and claimed that Tefft, Weller & Co. were liable to him for \$325, their proportion of the fee. The defendants offered evidence tending to show that inducements were offered to give the bond, that conditions accompanied it, and that certain instructions were thereafter given concerning the defense of the action brought by Mr. Byrne.

“The evidence offered was excluded under exception.

“The defendants then moved to dismiss the complaint on the ground that there was no evidence of any levy on behalf of Tefft, Weller & Co., and no proof that the sum paid by the plaintiff as counsel fee was a reasonable and fair charge. The motion was denied under exception.

“The jury, by direction of the court, found a verdict in favor of the plaintiff for \$325, and from the judgment entered thereon the defendants appeal.

“The relevancy of the testimony ruled out must be determined by reference to the answer of the defendants, for if relevant it must have been offered to sustain its allegations. They allege that a levy had been made on the property of Von Der Linden, under attachments issued in the two suits brought by Weinberg and Claflin, that they (the attaching creditors) had indemnified the sheriff in those actions immediately upon the making of the levy, and that the sheriff's attorneys had represented to Mr. Schell, the attorney for Tefft, Weller & Co., that the sheriff was about to sell the property levied on, and that if they (the defendants) would give the sheriff a bond of indemnity he would pay the amount of their execution out of the proceeds of the sale about to be made, whereupon they executed and delivered the bond sued upon.

“The matter pleaded constitutes no defense. The bond was delivered to the obligee, and parol evidence of conditions qualifying the delivery was inadmissible (*Cocks v. Barker*,

Grant v. Tefft.

45 N. Y. 110). A bond of indemnity given to the sheriff applies as well to a levy made before the bond was given as to one made afterward, and the obligors in a suit upon the bond are chargeable with the knowledge of the prior levy (*Reilly v. Coleman*, 1 City Ct. Rep. 476). The levy made by the sheriff under the prior writs enured to the benefit of the Tefft, Weller & Co. judgment (Crocker on Sheriffs §§ 413, 442), so that the admission in the answer that a levy had been made under the writs in the cases of Weinberg and Claflin sufficiently proves a levy under the execution issued on the Tefft, Weller & Co. judgment.

“The next defense is that, immediately after the commencement of the action by Byrne against the sheriff, the defendants notified the sheriff’s attorneys that they did not wish that action defended. Assuming, as we do, that ordinarily an indemnifying creditor may give such a direction, in order to save the expense of a useless litigation, the rule cannot be extended to a case like the present, where other creditors have an interest in the defense of such action and do not consent to its discontinuance. The sheriff was sued for the consequences of his levy and sale under all process in his hands, and was obliged to justify under all such writs for the joint protection of all the judgment creditors interested.

“True, if the sheriff had become satisfied that the action against him was well founded, and that he had no legal defense to it, he might have allowed judgment to go against him by default, or even by consent. But such a judgment would not have concluded the judgment creditors who did not consent to that course from proving that the alleged cause of action on which the judgment was permitted to go *pro confesso* was without foundation; and in that case the sheriff would have been obliged to pay the judgment himself and have no remedy over on the indemnity bonds given by the objecting creditors.

“That the defense interposed by the sheriff to that action was meritorious is proven by the result. Two trials were

Grant v. Tefft.

had, at both of which the jury disagreed, and the plaintiff therein, as a consequence, finally abandoned and discontinued the prosecution. If the action had been allowed to go undefended, as the defendants seem to have desired it to have gone, the recovery against the sheriff could not have been less than the sums collected and paid over, which aggregate \$6,232.86, and this without considering the expense connected with the levy and sale. In consequence of the defense by the sheriff, the indemnitors, instead of being called upon to pay their proportionate amount of the damages and costs that might have been recovered in the Byrne action, are now called upon to pay only their proportionate share of the \$1,000 fee paid for conducting such defense.

“ When the defendants executed the bond of indemnity they knew that other creditors had issued process against the same debtor; they knew that a levy had been made under these prior writs, and that the creditors issuing them had indemnified the sheriff, and with this knowledge they executed the bond in suit, and became parties to the act of levy and sale jointly with the other obligors, to such an extent that Byrne could have prosecuted the indemnitors jointly, either with or without the presence of the sheriff as a party defendant (Barbour on Parties, 203, 204; Cowen Treatise, § 765; *Herring v. Hoppock*, 15 N. Y. 409).

“ If such an action had been brought, Tefft, Weller & Co. could have allowed it to have gone by default, so far as they were concerned, but they could not have prevented Weinberg and Claflin from defending the action, nor could they have escaped the entry of a joint judgment against all for damages and costs, if Byrne had ultimately succeeded (*Delatour v. Bricker*, 2 City Ct. Rep. 22). On principle, Tefft, Weller & Co. stand in no better position now. They must, so far as that suit is concerned, be considered *joint tort-feasors* with Weinberg and Claflin. They were, in effect, sued as such, and their liabilities must be determined with reference to the nature of that action and its legal consequences.

“ The defendants assumed this position by their bond of in-

Grant v. Tefft.

demnity, and could not change the nature of their liability by the giving of a notice in which the other creditors and indemnitors jointly liable with them neither joined nor approved. The evidence as to such notice was therefore properly excluded. The only other question to be considered is the exception to the refusal to dismiss the complaint on the ground that there was no evidence that the fee paid by the plaintiff to his counsel, \$1,000, was a fair and reasonable charge.

“In an action against indemnitors the practical question will always be what the plaintiff was obliged or authorized to pay, both in respect to the principal and incidental costs or expenses (1 Sutherland on Damages, 135).

“The plaintiff was authorized, for he was under legal obligation, to pay his counsel a reasonable fee, and this was agreed upon and fixed at \$1,000, and the payment of this sum created a legal presumption that it was a fair and reasonable charge. If the plaintiff's counsel had sued him to recover \$1,000, and he had suffered a recovery by default, or even consented to judgment therefor, such a presumption would certainly have attached. The Court of Appeals, in *Connor v. Reaves* (103 N. Y. 527), committed itself to this principle, which, in the opinion of the court, Judge ANDREWS says, ‘presents a feature not found in any of our reports.’

“In the case cited the court says: ‘The bond was given to indemnify the sheriff against suits and judgments to which he should be a party, growing out of that proceeding. The appellants did not make it a condition of their liability that they should have notice. They were satisfied that the sheriff should conduct litigations founded on his seizure of the property without reserving any right of intervention. They committed the matter to his discretion—not, indeed, by express words, but by necessary implication. It is true, the sheriff was not in a legal sense the agent of the sureties to manage suits brought against him, but the sureties agreed that no judgments should be recovered against him therein. They did not limit the indemnity to judgments obtained upon

Grant v. Tefft.

an actual trial, or after a contest in court, and they did not undertake to divest the sheriff of the power incidental to his position as a party to settle and adjust litigations instituted against him in view of the exigencies of the situation. It might very well happen that a judgment founded upon a compromise or agreement without actual trial would best promote the interest of all concerned.' The rule is that a judgment recovered after actual trial is conclusive on the indemnitors, while a judgment confessed is presumptive evidence only against the sureties, who are at liberty to show that it was not founded on any liability to the plaintiff in the action, or exceeds such liability (*Connor v. Reaves, supra*). It follows, as a legal sequence, that if the sheriff may fix a presumptive liability by suffering a recovery by default or confessing a judgment, he may, without incurring the expense of a judgment, confess the liability by payment without a suit, leaving the indemnitors to attack it by proof that it was not founded on any liability, or that the bill paid was excessive in amount, and therefore exceeded the legal liability; or, as was said in *U. S. v. Behan* (110 U. S. at pp. 345, 346), it will not do to say that the injured party has not been damaged at least to the amount which he has been induced fairly and in good faith to lay out and expend, unless the party objecting 'can show that the expenses of the party injured have been extravagant and unnecessary for the purpose of carrying out the contract.' If the sheriff believed the charge to be reasonable he was bound to pay it; he had no right, because he had an indemnity, to defend a hopeless action, and put the indemnitors to a useless expense attempting to defend himself against it. (See cases cited in Wood's *Mayne on Damages* 134.) The condition of the bond was to protect the sheriff, not only against actions and judgments, but 'counsel fees' incurred in defense of actions as well. The plaintiff relied upon the payment as evidence, and did not, therefore, plead the reasonableness of the fee paid. The defendants should have attacked the reasonableness of the charge in their answer; if they thought the sum paid exorbitant.

Grant v. Tefft.

ant, and should have followed it up by proof of its excessiveness at the trial, because the payment was only presumptive, not conclusive, evidence of its propriety. If the charge had been attacked by evidence that it was excessive, the plaintiff could only have recovered what was found to be fair and reasonable (1 Sutherland on Damages 799). The rendition of an attorney's bill, not paid, is not conclusive evidence of value even as between attorney and client (*Williams v. Glenny*, 16 N. Y. 389). If paid, it constitutes a good accord and satisfaction (*Id*). If the sheriff had not paid the bill, the question of value would have been an open one; having paid it, he presumptively did so because he was obliged to pay it, and he simply ran the chance of being compelled to prove its reasonableness if first attacked by evidence that it was excessive. It was not so attacked, and the presumption of its accuracy properly prevailed. It will not do to imply that what a person pays in the market for a marketable commodity furnishes some evidence of its value, and to assume that what a client pays his lawyer is of such doubtful character as to require proof, in the first instance, that the latter did not cheat the former by extravagant charges. If a merchant sues for the value of an article, or an artisan or a professional man for his fees, he must, if it be disputed, prove their reasonable value, because the price named by the one is disputed by the other; but where the bill is paid by a person acting under a bond of indemnity it is not going too far to presume, in the first instance, that the charge made by the one and acquiesced in by the other, followed by payment, carries with it at least the presumption that it was fair, leaving those who desire to question its propriety to attack it by proof to the contrary.

"Upon the entire record we are of opinion that no legal error was committed at the trial, and that the direction to find a verdict for \$325, the defendant's proportionate share of the expense incurred and paid in defending the Byrne suit, was proper, and that the judgment entered on such direction must be affirmed with costs."

Grant v. Tefft.

From the judgment of the General Term of the City Court entered in accordance with this opinion defendants appealed to this court.

Roscoe H. Channing, for appellants.

David Leventritt, for respondent.

LARREMORE, Ch. J.—Appellants could not succeed in this action without being allowed to occupy two absolutely inconsistent positions. They had formally indemnified the sheriff, and he, relying upon their bond and those of other judgment creditors, sold the property which he had before levied on, and collected and paid over to them the amount of their claim. But, at the time of giving such bond, defendants allege that they represented to the sheriff that they were preferred as creditors in an assignment which by that time had been made by the judgment debtors, and that they did not wish to attack such assignment. They also aver that later, when the action was brought by the assignee against the sheriff to recover damages for the wrongful conversion of the very property which defendants had indemnified the sheriff to sell, they notified the sheriff that they did not wish such action defended. These matters they seek to set up as defenses in the present action to recover from them, under their bond of indemnity, their proportionate share of the expense incurred by the sheriff in defending such action. A mere statement of their position is sufficient to make it plain that no court could sanction such a double-faced policy on the part of any litigant. Defendants desired to have the benefit of a sale under execution, in order to secure prompt payment of their claim. On the other hand, as the ultimate payment thereof was secured by the preference in the assignment, they propose to escape reimbursing the sheriff for the liabilities and expenses incurred in carrying through the execution sale and defending himself from the consequences thereof. The legal status of the matter is simply that, in the face of the bond of indemnity, their oral notices were

O'Connor v. Mayor &c. of New York.

meaningless and nugatory. By indemnifying the sheriff they elected to collect the debt by execution, and this action on their part necessarily contemplated the incurring of every liability legitimately arising out of the pursuit of that remedy. In company with the other judgment creditors they put upon the sheriff the obligation to perform certain acts involving personal risk, and, after he had started upon such course, he could not withdraw. The sheriff, having sold the property relying upon his bonds, the defending of the action brought by the assignee was something which he could not avoid. The expense incurred in such defense was one of the charges fairly covered by said bonds, and defendants are very properly compelled to pay their proportionate share thereof.

For the reasons stated in the opinion of MCADAM, Ch. J., at the General Term of the City Court, we think there was sufficient in the case to support the finding by the trial judge as to the reasonable value of the services rendered.

The judgment appealed from should be affirmed, with costs.

BOOKSTAVEN and BISCHOFF, JJ., concurred.

Judgment affirmed, with costs.

THOMAS O'CONNOR, Respondent, *against* THE MAYOR,
ALDERMEN AND COMMONALTY of the CITY OF NEW YORK,
Appellant.

(Decided February 10th, 1890.)

A period of less than forty-eight hours between the time of a snow fall and an accident due to a slippery street is not sufficient to charge the city with negligence in not causing the street to be cleared.

APPEAL from a judgment of this court entered upon the verdict of a jury and from an order denying a motion for a new trial.

O'Connor v. Mayor &c. of New York.

The action was brought to recover for injuries to plaintiff caused by slipping and falling on an accumulation of snow and ice on a sidewalk on one of defendant's streets. The jury rendered a verdict for plaintiff for \$500. A motion by defendant for a new trial was denied, and judgment for plaintiff was entered on the verdict. From the judgment and the order denying the motion for a new trial defendant appeals.

Edward H. Hawke, Jr., for appellant.

Louis J. Grant, for respondent.

LARREMORE, Ch. J.—The learned trial judge stated in his charge to the jury certain of the conceded facts in this case as follows: "It appears that Mrs. O'Connor fell on this ice or hard snow on the corner of Carlisle and Greenwich Streets. It appears that for ten or twelve days before the 25th of January there had been no considerable snow storm; in fact, as the sergeant of the signal service said, there had been only two small flurries of snow. Then on the 25th there was a snow-fall, and then it changed to rain, and then there was snow and rain, and these followed by sleet, and about half past two on the morning of the 26th of January the storm ceased. Then the temperature fell very low from that time forward down until the time of the accident, and afterwards the temperature was never above the freezing point; it was always down below, and never above the freezing point. Well, the 26th passed and the 27th came, and on the evening of the 27th about seven o'clock she fell."

The doctrine has been established by a number of recent cases that, while the obligation to keep the sidewalks reasonably free from snow and ice rests upon a municipal corporation, it shall nevertheless be allowed a reasonable time for the performance of such duty (*Taylor v. City of Yonkers*, 105 N. Y. 202; *Kinney v. City of Troy*, 108 N. Y. 567; *Kaveny v. City of Troy*, 108 N. Y. 571). Where the facts are

O'Connor v. Mayor &c. of New York.

uncontradicted the question as to what constitutes a reasonable time is a question of law to be decided by the court (*Wright v. Bank of the Metropolis*, 110 N. Y. 237; *Colt v. Owens*, 90 N. Y. 368; *Hedges v. H. R. R. Co.*, 49 N. Y. 223).

The facts here were so clearly uncontradicted that the trial judge stated them to the jury in his charge. Such facts bring the case at bar clearly within the authorities above cited. The period between the snow-fall and the accident was less than forty-eight hours, and we think, as matter of law, that a reasonable time had not elapsed either to presumptively charge the defendant with negligence in not causing the walk to be cleared, or to charge it with constructive notice that the walk was slippery and dangerous. It follows that there was not sufficient evidence to support the verdict. There was really no more to go to the jury in this case than in *Kinney v. City of Troy* (*supra*), and the complaint should have been dismissed.

The judgment appealed from should be reversed and a new trial ordered, with costs to appellant to abide the event.

BOOKSTAVEN and BISCHOFF, JJ., concurred.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

A motion for a re-argument was made at the succeeding General Term, and the following opinion was rendered thereon, April 7th, 1890.

BISCHOFF, J.—Counsel for respondent assumes that the opinion of the January General Term herein directing a reversal of the judgment appealed from was predicated upon defendant's want of notice, actual or constructive, prior to the happening of the accident complained of, that the sidewalk was in a dangerous condition, and that the court inadvertently overlooked the testimony of the defendant's police officer who admitted upon the trial that the condition of the sidewalk was known to him some time before the accident. No other ground for re-argument is assigned.

O'Connor v. Mayor &c. of New York.

A careful examination of the opinion referred to must be convincing that the reversal was directed upon the grounds that a municipal corporation is not chargeable with neglect in permitting its streets to be in a dangerous condition, in the absence of proof that there was reasonable time to render such streets safe; that the question whether or not there was such reasonable time is a question of law to be determined by the court; that the uncontradicted facts in the present case, showing an interval of less than 48 hours between the cessation of the snow-fall and the time of the accident, failed to show that defendant had a reasonable time within which to remove the accumulated ice and snow or otherwise to render the sidewalk in safe condition; that because of the want of such reasonable time the plaintiff had failed to establish negligence on the part of defendant and that it was error for the trial judge to submit the question of defendant's negligence to the jury.

This view renders the question of notice of no importance in this case, for if it be conceded that defendant had actual notice of the dangerous accumulation of ice and snow on the sidewalk in question, defendant must nevertheless be held absolved from the imputation of negligence if there was no reasonable opportunity to remove the danger between the time of its first appearance and the happening of the accident.

The motion for re-argument must be denied, with costs.

LARREMORE, Ch. J., concurred.

Motion denied, with costs.

People v. Goltze.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents,
against HENRY GOLTZE *et al.*, Appellants.

(Decided February 10th, 1890.)

On an application to set aside a judgment on a forfeited recognizance, where it appears that the applicant is entitled to the relief asked, he will be allowed an order on the comptroller directing a repayment of the amount of the recognizance, but not of the costs of entering judgment; it appearing that the money was paid to the comptroller, though he produces no certificate to that effect from the comptroller.

APPLICATION to vacate a judgment on a forfeited recognizance; and for a repayment of the moneys paid in satisfaction thereof.

The facts are stated in the opinion.

Ashbel P. Fitch, for the motion.

John R. Fellows, opposed.

PER CURIAM.—[Present, LARREMORE, Ch. J., BOOKSTAVEN and BISCHOFF, JJ.].—Judgment on the forfeited recognizance was vacated and directed to be cancelled of record, by the May, 1889, General Term of this court, but through inadvertence the defendant failed to incorporate in his order a direction to the comptroller to repay him the amount of the judgment. Discovering the mistake, an application was made to the November General Term to cure it, but on that application the defendant failed to give notice to the district attorney, and also failed to produce a certified copy of the order discharging the recognizance. In a memorandum made at the time the defendant was also directed to procure a certificate of the comptroller that the amount had been deposited with him. The defendant has now complied with all of these requirements, except the production of the certificate from the comptroller, which he says the comptroller refuses because he has no authority to give the same,

People v. Madden.

and it is not customary to do so, and in this, we think, he is right. The fact, however, of the payment of the money to him is apparent from the papers, and we think the plaintiff should have an order directing the comptroller to pay to the defendant or his attorney the amount of the forfeited recognizance, \$300, but not the amount of the costs of entering judgment, \$42.60.

Order accordingly.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondents,
against PAUL MADDEN *et al.*, Appellants.**

(Decided February 10th, 1890.)

Judgment on a forfeited recognizance will be set aside, where the principal appeared on the return day, though after forfeiture of bail, and was found guilty on his confession, and paid the fine imposed, and the people have lost no rights, and all costs have been paid.

APPLICATION to vacate a judgment on a forfeited recognizance.

The facts are stated in the opinion.

H. Hartman, for the motion.

John R. Fellows, opposed.

PER CURIAM.—[Present, LARREMORE, Ch. J., BOOKSTAVEN and BISCHOFF, JJ.]—Madden was arrested for violation of the excise laws and held to bail in \$100. On January 13th, 1890, the case was called for trial in the Court of Special Sessions, and upon Madden's failure to appear, the bail was declared forfeited, and judgment entered against the surety on the following day. Later in the same day on which the forfeiture occurred, Madden appeared for trial, and upon his confession was adjudged guilty, and fined \$50, which was

Thompson v. Manhattan R. Co.

immediately paid. It also appears from the certificates of the district attorney and deputy sheriff that the people have lost no rights, and that all expense incurred by such forfeiture has been paid.

The application should be granted.

Order accordingly.

WILLIAM W. THOMPSON, Respondent, *against* THE MANHATTAN RAILWAY COMPANY *et al.*, Appellants.

PELL THOMPSON *et al.*, Respondents, *against* THE MANHATTAN RAILWAY COMPANY *et al.*, Appellants.

(Decided February 10th, 1890.)

In actions against three elevated railroad companies, as joint defendants, for damages to plaintiffs' real property from the construction, maintenance, and operation of an elevated railroad in the street in front thereof, and for injunctions restraining defendants, the court found that one of the defendants had not taken any part in the construction, maintenance, or operation of such railroad, negating the allegations of the complaint as to such defendant; and it was not alleged that such railroad company threatened or intended to take any part in the maintenance or operation of said railroad. *Held*, that judgments against all the defendants must be reversed as to said railroad company.

In such an action, the admission of evidence on the part of plaintiffs of the value of the premises without the location of the road, is not ground of reversal, where similar evidence was admitted on defendants' part.

The rejection of evidence of a witness as to what he paid for rent of premises in the neighborhood is not error, where it was not shown under what circumstances he occupied the premises, or why the landlord was induced to receive such amount as rent for the premises.

Remaindermen may maintain an action in equity to restrain the maintenance of an elevated road in the street in front of the premises in possession of the life tenant, and for damages for the injury to the inheritance. And in ascertaining their damages, the damages to the whole fee may be apportioned between the life tenant and remaindermen according to the annuity tables.

Between 1868 and 1870 the property in question rented for \$5,350 per annum; in 1870-71, when partly occupied, for \$3,350; in 1871-76 for \$4,250; in 1876-77, being the year immediately preceding the construction of defend-

Thompson v. Manhattan R. Co.

ants' road, for \$3,900; and since then for about \$8,000. *Held*, that an allowance of \$25,000 damages was excessive and should be reduced to \$15,000.

APPEALS from judgments of this court entered on trial by the court without a jury.

The facts are stated in the opinion and in the report of the decision at the Special Term, 15 Daly p. 439.

Edward S. Rapallo, Brainard Tolles, and Henry B. B. Stapler, for appellants.

John A. Weeks Jr., for respondents.

BOOKSTAVEN, J.—These two actions were tried at the same equity term by the same judge, in relation to the same premises, and a judgment was rendered in both at the same time. They may therefore with advantage be considered together.

In the year 1870 Mary Clendinen Thompson, wife of the plaintiff William W. Thompson, died intestate seized and possessed of the premises No 168 Pearl Street, and left her surviving her husband, and Pell Thompson, Mary G. Thompson and Clendinen Thompson, issue of said marriage and her only heirs at law. In April, 1888, William W. Thompson, as tenant by the curtesy, commenced his action in equity against the elevated railroads in front of the premises for the loss of rents and for an injunction restraining the defendants until his future damages should be ascertained and paid; and the plaintiffs in the second action also commenced their action in the same year against the elevated railroads in front of said premises for injury to their inheritance, and demanded an injunction and damages.

The court, in the seventieth paragraph of its decision in the first action, and the seventy-fifth paragraph of its decision in the second action, has found that the Metropolitan Elevated Railroad Company has never constructed nor taken any part in the construction of an elevated railway in Pearl Street in front of and abutting upon the premises described in the complaint. And in the seventy-first paragraph of its decision in the first action and the seventy-sixth paragraph of its decis-

Thompson v. Manhattan R. Co.

ion in the second action, the court has found that the Metropolitan Elevated Railway Company has never maintained nor operated nor taken any part in the maintenance or operation of an elevated railway in Pearl Street in front of and abutting upon the premises described in the complaint. The only allegations of the complaint relative to the defendant the Metropolitan Elevated Railway Company were those which charged upon it a connection with the construction, maintenance, and operation of the railway. No amendment of the complaint was asked for or granted upon the trial. The allegations of the complaint with respect to the Metropolitan Elevated Railway Company are directly negatived by the findings of the court. The only ground upon which it can possibly be claimed that the Metropolitan Elevated Railway Company should be enjoined from maintaining a railroad which it does not own and in which it never had any interest, is that it threatens or intends to take part in the maintenance or operation of the railway complained of. This is not alleged in the complaint, nor has the trial judge found it to be true. It therefore follows that the judgment must be reversed in both actions as to the defendant The Metropolitan Elevated Railway Company (*Kane v. Metropolitan El. R. Co.*, 25 N. Y. St. Rep. 587), with costs of appeal and an equitable proportion of the disbursements.

It is claimed on the part of the appellants that the court erred in allowing witnesses to testify what in their judgment would be the value of the premises in question if the elevated railroad had not been constructed, and that the opinion of the Court of Appeals in *McGean v. Manhattan R. Co.* condemns the admission of such testimony. But as was well said in that case, and the remark is equally applicable to the present; "The trial seems to have been conducted on both sides, and more particularly on that of the defendant, upon the theory that opinions were admissible as to rental value of the premises and causes which affected it." The fact is that for a long time, in nearly all of these damage cases, such testimony was admitted both as to the rental and fee value, although it must

Thompson v. Manhattan R. Co.

be conceded that it was very unsatisfactory, and could aid the court but little in arriving at a conclusion upon the damages to any particular piece of property; but we do not see how the admission of such evidence, especially when it was admitted on both sides, could have worked an injustice to the defendants.

Appellants also contend that the court erred in rejecting the testimony of a witness named Mayer as to what rent he paid for certain premises in Water Street. The defendant, we think, had not laid sufficient foundation for this testimony; it had not been shown under what circumstances he occupied the premises in Water Street or why the landlord was induced to receive for such premises the rent he did.

The other objections to the admission or exclusion of evidence we do not regard as materially affecting the result in these actions.

The appellants also contend earnestly that none of the plaintiffs should be allowed to maintain these actions, because they, as abutting owners upon Pearl Street, had no fee in that street, and consequently could not have been deprived of any property right by reason of the construction of the railroad complained of; also, that the plaintiffs in the second action, being remainder-men only, could not maintain an action in equity to restrain the operation of defendants' railroad. The learned Chief Judge who tried these cases overruled both objections, and we think in his opinion has clearly established the right of the plaintiffs in both actions to maintain the same, and also laid down the proper rule by which to determine how the damage should be apportioned between the tenant by curtesy and the remainder-man.

But the amount which he fixed for the total damages to the premises, to wit, \$25,000, seems to us excessive. The property is situated on the southeast corner of Pearl and Pine Streets, with a frontage on the former of 27 ft. 7 in., and a depth on the latter of 47 ft. 8 in., making altogether about 1,320 square feet, or a little more than half an ordinary city lot. From 1868 to 1870 this property let for \$5,350;

Thompson v. Manhattan R. Co.

for the year 1870-71 it let for \$3,350 only, and the reason assigned in the testimony for the diminution in this year was the fact that the first floor was unlet; for the year 1871-72, being the year before the panic, the entire property let for \$4,250, and this it continued to produce until 1875-76. The testimony does not clearly show the cause of this reduction in the rent, but it was long before the erection of the elevated railroad, and shows a loss in the rents from 1868-69 of over twenty per cent., which could in no way be attributed to the actual or threatened construction of the elevated railroad, nor even to the panic, for the reduction took place before that had set in. For the year 1876-77, being the year immediately prior to the construction of the elevated railroad, the entire property let for \$3,900. After the elevated railroad went into operation, the rents have varied somewhat, but averaged between \$2,800 and \$2,900 per annum, and amounting to about \$3,000 when the building was fully occupied. Now if we allow ten per cent. as the ratio between the rental and fee value of the premises in 1868-69, the property then was worth \$50,000, and this is what the experts with considerable unanimity fix the price at; while allowing the same ratio for 1871-2 would make the value of the premises \$42,500, due to some other cause or causes than the effect of the panic or the building of the road. The reduction from \$4,250 to \$3,900 would clearly be attributable to the effect of the panic, and that alone. The subsequent reduction from \$3,900 to \$3,000 may be fairly attributed to the effect of the construction and operation of the elevated railroad, and allowing the same ratio of ten per cent. would show that the damage to the fee value caused by the road simply, would be \$9,000 only, leaving out of view any natural appreciation of the property arising from the general increase of values in this city. But the witnesses both for plaintiff and defendant testify that the present ratio between rental and fee value varies from seven to nine per cent.; if we take an average of eight per cent., then the damage to the fee value would be \$7,200, which would represent the actual

Matter of Cohen:

damage to the property, were we not to take into consideration the general appreciation of values. Exactly what this appreciation is, however, is very hard to determine, from the nature of things, and especially from the evidence in this case. The building is all the while growing older and needing repair, while the ground is appreciating in value. We think that this appreciation cannot be more than seven or eight thousand dollars, and that fifteen thousand dollars would fully cover all the damages to the fee in both of these cases, and that, therefore, the judgments in each case should be reversed and a new trial had, unless the plaintiffs in each case will stipulate to reduce their judgments proportionately; and if this stipulation is given, the judgments should be affirmed for the reduced amount as to the defendants other than the Metropolitan Elevated Railroad Company, without costs.

BISCHOFF, J., concurred.

Judgment accordingly.

In the Matter of the Application of GEORGE COHEN, an Insolvent Debtor, for a Discharge from his Debts.

[SPECIAL TERM.]

(Decided February, 1890.)

Schedules filed with the petition of an insolvent debtor for a discharge from his debts, in stating, as required by section 2162 of the Code of Civil Procedure, the places of residence of each creditor, gave the names of streets and house numbers only, not specifying any city, town, or village. *Held*, that it could not be assumed that streets of the same names in the city of New York were intended, there being nothing in the schedules to indicate that to be the fact; that, in view of the provision of section 2165 of the Code of Civil Procedure for publication of the order to show cause for a longer period if any of the creditors reside at a distance of more than 100 miles than if all reside within that distance, the period for publication could not be determined; and, the jurisdiction being special, and depending on strict compliance with statutory requirements, the proceedings must be dismissed.

Matter of Cohen.

MOTION by creditors of an insolvent debtor to dismiss for want of jurisdiction his application for a discharge from his debts.

The facts are stated in the opinion.

Gruber, Bard, & Landen, and Horwitz & Hershfield, for the motion.

Alexander Finelite, opposed.

BISCHOFF, J.—The jurisdiction conferred upon the court to entertain proceedings of this nature, and to grant the discharge of an insolvent debtor from his debts, is special only, and depends upon a strict compliance with all statutory requirements; and, if it appears upon the face of the petition or schedules that compliance with one of these requirements has been omitted, the court is without jurisdiction, and a discharge based upon such petition or schedule is absolutely void, and of no effect (*Morrow v. Freeman*, 61 N. Y. 515). Section 2162 of the Code of Civil Procedure requires that the schedules to be filed with the petition shall, among other things, state the place of residence of each creditor. On the return-day of the order to show cause granted herein, Gustave White and Simon Oberfelder, constituting the firm of White & Oberfelder, creditors of the petitioner, through their counsel, claimed that their places of residence were not correctly stated in the schedules, and that, for such error on the part of the petitioner, this court was without jurisdiction. It was conceded, however, that White & Oberfelder were residents of the city of New York, and counsel for petitioner thereupon applied for leave to amend the schedule by inserting a correct statement of the place of residence of said creditors. This application was opposed, and upon the right of the court to allow the amendment depends the further prosecution of these proceedings.

I am of the opinion that, because of the defective schedules herein, the court cannot grant the amendment applied for. A mere designation of the city, town, or village of the credi-

Matter of Cohen.

tor's place of residence, without adding the name of the street and house number, has been held sufficient compliance with the statute (*Wiley v. Brigham*, 81 N. Y. 13); and if, in the present case, the city of the opposing creditor's place of residence had been stated, sufficient would have appeared to clothe the court with jurisdiction and power to allow the amendment by correcting an error in the name of the street or house number. The schedules filed herein on November 22d, 1889, however, in no instance specify the city, town, or village of the creditors' place of residence. The names of streets and house numbers only are given, and there is nothing in the schedules to indicate that streets of the same names in the city of New York were intended. Such may have been the petitioner's intention; but the court is not authorized, from the mere fact that there exists in the city of New York a street of the same name as that mentioned in the schedule, and alleged to be the street of the creditor's place of residence, to assume that such creditor resides in the city of New York. Section 2165 of the Code of Civil Procedure makes it of vital importance that the city, town, or village of each creditor's place of residence be stated. That section provides for publication of the order to show cause for six successive weeks only, if all creditors reside within 100 miles from the place where the cause is to be shown, and for publication for ten successive weeks if one or more of such creditors reside at a greater distance. Unless, therefore, the city, town, or village of each creditor's place of residence is stated, the court cannot correctly determine the period for which the publication shall continue. I am constrained, therefore, to hold that the schedules are fatally defective, and that this court has not acquired jurisdiction to proceed.

Proceedings dismissed.

Arnson v. Abrahamson.

PAULA ARNSON, Appellant, *against* MAX ABRAHAMSON
et al., Impleaded with Wolf Gekowsky, Respondents.

(Decided April 7th, 1890.)

It is no defense to an action against an indorser of a promissory note that the maker's or prior indorser's signature is a forgery, for he impliedly warrants the genuineness of such signatures.

APPEAL from a judgment of the District Court in the City of New York for the Fourth Judicial District.

The facts are stated in the opinion.

A. H. Sarahson, for appellant.

LARREMORE, Ch. J.—This was an action brought upon a promissory note against the defendant Gekowsky, the maker, and the defendants Max Abrahamson and Nathan Storm, two indorsers upon the note. It was insisted as a defense that the note was a forgery; upon which an issue was framed and tried, and a verdict rendered in favor of the defendants. The indorsers claimed that they were discharged from liability on account of said alleged forgery.

It is a well settled legal principle that an indorser impliedly warrants that the instrument is not forged; and if it is he is liable upon this warranty; he cannot question the signature of the maker or previous indorser, or take advantage of the fact that the signatures of the maker or previous indorser were forged (*Turner v. Keller*, 66 N. Y. 66; *Herrick v. Whitney*, 15 Johns. 240; *Shaver v. Ehle*, 16 Johns. 201; *Morrison v. Curry*, 4 Duer 79). The acceptor of a bill is presumed to know the signature of the drawer; and if the bill is accepted upon the faith of his indorsement he is liable to a *bona fide* indorsee or holder for value, even though the bill proves to be a forgery (*National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; *Bank of Commerce v. Union Bank*,

Berg v. Carroll.

3 N. Y. 230. See also *Coggill v. American Exch. Bank*, 1 N. Y. 113.)

It has been decided that where a note is indorsed for the accommodation of the maker or payee and is negotiated to a third person who pays value for it, the party receiving it and who pays value, is entitled to recover upon it against such indorser notwithstanding the purchaser took it with full knowledge that it was accommodation paper (*Ross v. Bedell*, 5 Duer 462; *Grant v. Ellicott*, 7 Wend. 227; *Commercial Bank v. Norton*, 1 Hill 501).

This case comes within the rule of *Fassin v. Hubbard* (55 N. Y. 465), as there was no limitation of the indorsers' liability upon the contract.

The judgment appealed from should be reversed as to the defendants Max Abrahamson and Nathan Storm; and judgment should be ordered against them in favor of the plaintiff, with costs.

BISCHOFF, J., concurred.

Judgment accordingly.

ISAAC BERG, Respondent, *against* JOSEPH W. CARROLL *et al.*,
Appellants.

(Decided April 7th, 1890.)

The relation of employer and employee, under a contract for a definite term, having been once established in an action for salary, it will be presumed to have continued to the end of the term unless the contrary appear, and plaintiff, in order to recover, need not establish continuance by affirmative proof.

Where the contract was for continuous employment under the direction of the employers, proof of an actual rendition of services is not necessary; a readiness to serve is all that is required; and an abandonment of the employment by the employers cannot be predicated upon their neglect to require actual services, unaccompanied by some affirmative act indicating a discharge or dismissal from service.

Berg v. Carroll.

APPEAL from a judgment of the District Court in the City of New York for the Fifth Judicial District.

The facts are stated in the opinion.

Shepard & Osborn, for appellants.

Samuel D. Levy, for respondent:

BISCHOFF, J.—Joseph Glücksman, plaintiff's assignor, was employed by defendants as travelling salesman under a written contract pursuant to the terms of which the defendants agreed to employ him from April 22d, 1889, to December 31st, 1889, at the annual salary of fifteen hundred dollars payable in weekly instalments of thirty dollars each; and this action was brought to recover the instalments for the five weeks commencing July 6th and ending August 10th.

Upon the trial plaintiff introduced evidence tending to show that shortly before July 5th, 1889, Glücksman was in St. Louis upon defendants' business, and that, owing to their neglect to supply him with the necessary money for expenses, he was compelled to return to New York, and arrived there about July 5th. It also appeared on the part of plaintiff that on his return Glücksman at once reported at defendants' place of business and demanded further instructions in his employment, besides an advance of money for his necessary expenses in their business; but that defendants wholly failed to give such instructions or to supply such money, and that, after awaiting such instructions for five weeks, from July 6th to August 10th, without receiving either instructions to proceed or travelling expenses or salary, Glücksman, on the last mentioned day, elected to terminate his employment. He thereupon assigned his claim for salary for the five weeks mentioned to the plaintiff. Glücksman, and Hoff, his attorney, examined as witnesses for the plaintiff, testified that throughout the period mentioned the former was not only ready and willing to continue his employment, but that he also held himself in readiness to perform such services as de-

Berg v. Carroll.

defendants might have properly required of him under his contract of employment, and that defendants were repeatedly advised to that effect.

Defendants, on the other hand, adduced proof tending to show that Glücksmann, in violation of instructions to proceed from St. Louis to Chicago upon defendants' business, returned to New York, and on his return absolutely refused to continue his employment unless they would agree to the payment of a demand not involved in this action, the particulars of which were nowhere sufficiently explained. It was claimed for the defendants that this refusal on Glücksmann's part constituted a breach of this contract and an abandonment by him of his employment, and that because of such breach and abandonment he was precluded from recovering any salary alleged to have accrued subsequent thereto.

Upon this contradictory evidence the trial justice charged the jury that they must determine whether or not there was a termination of the contract by abandonment of the employment or otherwise on the part of either party prior to the period for which the salary was claimed, and that, if they found that there was such termination or abandonment, plaintiff could recover only such salary as had accrued to Glücksmann prior thereto, but, if they found there was no such termination of the contract or abandonment of the employment, and that Glücksmann held himself ready, during the period for which salary was claimed, to receive and act upon defendant's directions touching his employment, plaintiff was entitled to recover the full amount claimed without proof showing that actual services were rendered.

The jury returned a verdict for plaintiff for the full amount claimed.

Defendants denied any breach of contract or abandonment of employment on their part, and alleged that such abandonment was by Glücksmann. Glücksmann, however, denied that he abandoned defendants' service prior to August 10th, and further denied that prior to said last mentioned date he had been discharged or dismissed by defendants. There was evidence upon the trial in support of the contention of each party, presenting such a conflict, concerning the fact of the termination of the contract or the abandonment of the employment thereunder prior to August 10th, as to render the sub-

Berg v. Carroll.

mission of that question to the jury imperative upon the court. The jury having found for the plaintiff in the full amount claimed, it must be assumed, for the purposes of this appeal, that the contract of employment continued valid and subsisting during the period for which the salary was demanded in this action, and, there being no exceptions to the charge or refusals to charge, the only questions presented for review are those arising upon the denial of the motions for dismissal and the exceptions to the admission and exclusion of evidence.

A motion for dismissal was made by defendants' counsel when plaintiff closed his direct proof, and again upon the final submission of the case, and as both motions were made upon substantially the same grounds they may be considered together. These grounds were,—that the evidence failed to show that the employment had continued during the period for which salary was claimed; that it appeared that such employment had been abandoned prior to the commencement of that period; that plaintiff's remedy, if the abandonment by defendants was without justification, or by Glücksman upon sufficient provocation, was by an action for damages for breach of the contract and not for salary, and that salary could only be recovered upon proof that the services for which compensation was claimed had been actually performed, but that plaintiff had failed to show such performance by Glücksman.

The period for which defendants had agreed to employ Glücksman was from April 22d, 1889, to December 31st, 1889. It was admitted by the pleadings that Glücksman entered upon the employment and continued therein until July 5th. The relation of employer and employe having been once established, under the contract admitted to have been entered into, and the term of employment not appearing to have expired by limitation, it must be presented to have continued until the contrary appeared (Greenleaf on Evidence §§ 41, etc.; Beckwith v. Whalen, 65 N. Y. 322). To make out a *prima facie* case, plaintiff, then, was not required by affirmative proof to establish a continuance of the employment. Its continuance was to be presumed until affirmative proof of its termination was introduced.

There was nothing in plaintiff's direct proof showing a termination of the contract of employment by either party thereto. Glücksman distinctly denied that he had ever left

Berg v. Carroll.

the defendants' employment. Defendants introduced proof tending to show an abandonment of the employment, which was met by opposing proof on the part of the plaintiff, and when, upon the final submission of the case, the motion for dismissal was renewed, there was a conflict of evidence concerning such question which could only have been properly determined by the jury.

Neither was it incumbent upon plaintiff to show the actual rendition of services by Glucksman. The contract was for continuous employment, and readiness to act upon the direction of the defendants was all that could be required. In the absence of any express provision to the contrary all that the employee engages to do is to hold his time and services subject to the disposal of his employer and to perform such duties, within the scope of his employment, as may from time to time be assigned to him. If the employee holds himself in readiness and complies with his employer's directions in such employment he has discharged his obligation, and the law will not require him to forfeit his right to the compensation agreed upon because the employer has seen fit to withhold directions from him and thus kept him in idleness. An abandonment of the employment by the defendants cannot therefore be predicated upon their neglect to require actual services from Glucksman unaccompanied by some affirmative act indicating the latter's discharge or dismissal from service.

There being then nothing upon the close of plaintiff's direct proof to show a termination of the employment, and there being a conflict of evidence concerning such termination upon the final submission of the case, the motions to dismiss were properly denied. The verdict established the fact that the employment continued up to August 10th. The cases of *Moody v. Leverich* (4 Daly 401, 14 Abb. Pr. N. S. 145), and *Weed v. Burt* (78 N. Y. 193), are not applicable to the facts of this case. In those cases it appears that the salary sought to have been recovered accrued subsequent to the dismissal of the plaintiff from the defendant's employment, while in

Bilordeaux v. Bencke Lithographic Co.

this action the salary sought to be recovered accrued during the continuance of the employment.

Neither of defendants' exceptions to the rulings of the trial justice on the admission and exclusion of evidence shows sufficient merit to warrant a reversal.

The judgment should be affirmed, with costs.

LARREMORE, Ch. J. concurred.

Judgment affirmed, with costs.

CHARLES BILORDEAUX, Appellant. *against* H. BENCKE
LITHOGRAPHIC COMPANY, Respondent.

(Decided April 7th, 1890.)

A contract to render instructions to another in certain secrets of the art of photography, the instructions to be given on Sunday, is in violation of the prohibition of the Penal Code, as amended by Laws 1883, chapter 358, against labor on Sunday, excepting works of necessity or charity; and no recovery can be had thereon.

• APPEAL from a judgment of the District Court in the City of New York for the Third Judicial District.

The facts are stated in the opinion.

Paul Wilcox, for appellant.

Philip W. Holmes, for respondent.

BISCHOFF, J.—Plaintiff, a photographer, agreed to instruct defendant in certain secrets of the art of photography, for which defendant promised to pay him the sum of one hundred dollars. It was part of the agreement that the instructions should be given on Sunday. After part performance on plaintiff's part, defendant refused to proceed, and plaintiff thereupon brought suit to recover the sum of fifty dollars, the unpaid portion of the compensation agreed upon.

Billordeaux v. Bencke Lithographic Co.

The defense was that the contract was illegal, being in violation of the statute prohibiting work excepting for charity or necessity on Sunday, and judgment was rendered for defendant, from which an appeal has been taken.

The facts were admitted upon the trial, and the trial justice does not appear to have erred in his application of the law. Upon the argument of this appeal, counsel for appellant contended that the services to be rendered by the appellant could not be deemed to have been of a "servile" nature, and were not therefore within the statutory prohibition, and in support of his views he cites a number of decisions of the courts of this state defining the meaning of the word "servile" as used in the statute. Counsel for both parties appear, however, to have overlooked an important amendment of the Penal Code of this State. Chapter 858 of the Laws of 1888 amends section 263 of the Penal Code by omitting the word "servile," and providing that "all labor on Sunday is prohibited, excepting the works of necessity or charity." The authorities cited by counsel for appellant are therefore no longer applicable, and the services agreed to have been performed by appellant cannot be said to have been required in a work "of necessity or charity." Neither is there anything in the statement of the facts agreed upon for the purposes of the trial from which an inference of the "necessity" of the services of the appellant on Sunday could be drawn. The contract being in violation of an express statute was therefore illegal and void, and neither party thereto can have redress against the other for a breach (*Pennington v. Townsend*, 7 Wend. 276).

The judgment appealed from must be affirmed, with costs.

LARREMORE, Ch. J., concurred.

Judgment affirmed, with costs.

Bohm v. Loewer's &c. Brewery Co.

RUDOLPH BOHM, Respondent, *against* V. LOEWER'S GAMBRINUS BREWERY COMPANY, Appellant.

Defendant corporation was managed by three trustees, its sole stockholders, two of whom were president and treasurer, respectively. A by-law provided that all contracts involving a liability of the corporation for \$500 or more must be in writing, executed by both president and treasurer, and attested by the seal of the company. *Held*, that no recovery could be had on a written lease to it of premises for eight months at an annual rental of \$900 payable monthly in advance, which was signed by the president only, and was not under seal, and which the treasurer expressly refused to sign, where the premises were never occupied.

APPEAL from a judgment of the District Court in the City of New York for the Fourth Judicial District.

The facts are stated in the opinion.

C. J. G. Hall, for appellant.

Jacob L. Hanes, for respondent.

BISCHOFF, J.—Defendant is a corporation managed by three trustees, Loewer, the president, Hall, the treasurer, and Tompkins; they being also the only stockholders. The business of the corporation was the manufacture and sale of beer, and the by-laws, adopted at a joint meeting of the stockholders and trustees, for the management of the company's business, among other things provided that no liability on behalf of the corporation should be contracted, exceeding in amount one hundred dollars, excepting with the consent of the treasurer, or at least two of the trustees, and that all contracts involving a liability of the corporation for five hundred dollars or more must be in writing, executed by both the president and treasurer and attested by the seal of the company. On or about August 23d, 1889, the plaintiff, by an instrument bearing date on that day, and under his hand and seal, undertook to let and rent the premises known as No. 129

Bohm v. Loewer's &c. Brewery Co.

Orchard Street, in the city of New York, to the defendant for the period of eight months, commencing September 1st, 1889, at the annual rental of nine hundred dollars, payable in instalments of seventy-five dollars each, in advance, on the first day of each and every month. This alleged lease was also executed by Valentine Loewer as president of the defendant, but not by the treasurer, and the seal of the defendant does not appear to have been affixed. No rent ever appears to have been paid, and an action was brought to recover the first monthly instalment due September 1st, 1889. The trial resulted in a judgment in favor of the plaintiff and against the defendant for the sum of seventy-five dollars and fifty-five cents, the amount of rent and interest, with costs, and from that judgment defendant appeals to this court.

A careful examination of the evidence fails to reveal any legal merit in favor of the plaintiff. The execution of the lease having been denied, it was incumbent upon the plaintiff to prove a lease binding and operative upon the defendant. In this he has utterly failed. The liability sought to be charged upon the defendant under the alleged lease exceeds the sum of five hundred dollars, and comes therefore within the provisions of the defendant's by-laws limiting its creation to an instrument in writing, executed by the president and treasurer and attested by the corporate seal, and plaintiff was chargeable with notice of these restrictive provisions upon the powers of defendant's officers (*Rathburn v. Snow*, 15 Daly 141; *Westerfield v. Radde*, 7 Daly 326).

An attempt was made by the plaintiff upon the trial to show a subsequent adoption or ratification of the president's act by the trustees, predicated upon the neglect of the trustees to repudiate the transaction when it was brought to their notice. But in this attempt the plaintiff was equally unsuccessful. The only trustees who appear to have had notice of the execution of the alleged lease by the president, were the president himself and Mr. Hall, the treasurer. The trustees, however, as such, could not, pursuant to the provisions of the by-laws mentioned, have originally created any liability on

Bond v. Brewster.

behalf of the corporation exceeding five hundred dollars in amount, and it cannot be said that they can by implication do the acts prohibited in unequivocal terms (*Peterson v. Mayor, &c.*, 17 N. Y. 449; *Brady v. Mayor, &c.*, 20 N. Y. 312-319).

Again, when Mr. Hall was requested to sign the alleged lease as treasurer he refused, and his testimony on this point is wholly uncontradicted. No ratification can therefore be based upon his knowledge of the facts.

The judgment must be reversed, with costs, and a new trial ordered.

LARREMORE, Ch. J., concurred.

Judgment reversed, with costs, and new trial ordered.

ADDISON CURTIS BOND, Respondent, *against* CHARLES
BREWSTER, Appellant.

(Decided April 7th, 1890.)

In an action for slander, alleged to have caused the discharge of plaintiff from his employment, the slanderous words set forth in the complaint, and alleged to have been spoken by defendant in answer to an inquiry whether defendant had paid plaintiff commissions, were, "We have not paid him any commissions. We have lent him money which he has not repaid, and have done printing for him for which no charge has been made;" and the complaint alleged that the words were accompanied with "certain inflections of voice, glances, gestures, and movements indicating the ironical sense of the words," and explaining the true meaning of the language to be that said loan and services were, in fact, payments as commissions or rewards. There was evidence for plaintiff tending to show the speaking of the words, or part of them, but nothing to support the innuendo relied on. *Held*, that as the gist of the action was not in the words, which were themselves innocent, but in what was alleged to have accompanied them, a motion to dismiss the complaint should have been granted.

APPEAL from a judgment of this court entered on the verdict of a jury.

Bond v. Brewster.

The action was brought for slander in speaking of plaintiff the words, as set forth in the complaint, "We have not paid him any commissions. We have lent him money which he has not repaid. We have done printing for him for which no charge has been made," in answer to an inquiry made of defendant by an officer or agent of the Waterbury Watch Company, by which plaintiff was employed, whether defendant had paid plaintiff commissions; and the complaint alleged that the words were accompanied with "certain inflections of voice, glances, gestures, and movements indicating the ironical sense of the words," and "explaining the true meaning of the language used to be that the said loan and services were in fact payments as commissions or rewards;" and that in consequence thereof plaintiff was discharged from his employment by the Waterbury Watch Company. At the trial the jury found a verdict for plaintiff for \$500, and judgment for plaintiff was entered thereon. From the judgment defendant appealed.

George W. Miller, for appellant.

C. DeHart Brower, for respondent.

LARREMORE, Ch. J.—It is well settled that in actions for slander the words complained of "must be proved as laid," and that it is not sufficient to prove equivalent language. "Words to the same effect are not the same words. The plaintiff need not prove all the words on the record, yet he must prove so much of them as will be sufficient to sustain his cause of action." (2 Phil. Ev. 97, quoted with approval in *Fox v. Vanderbeck*, 5 Cow. 513). This same rule was applied in *Olmstead v. Miller* (1 Wend. 506), which was a case in which special damage was alleged; the words declared upon not being actionable *per se*. I cannot discover that the principle established by the early cases has ever been departed from or seriously modified. These authorities are cited, apparently with approval, in *Lynde v. Johnson* (39 Hun 12). The evidence offered before plaintiff originally

Bond v. Brewster.

rested was insufficient to prove the alleged slanderous words "as laid." Such evidence consisted entirely of plaintiff's own testimony, and was to the effect that he called on defendant, and said, "I understand that you have told Mr. Merritt that I had exacted a commission from you; and you know it is false, and I don't understand why you should make it," and that defendant confessed that he had used this language or its equivalent, and apologized for what he had said. The only thing, therefore, offered, in chief, in support of the cause of action, was an alleged admission of defendant that he had uttered something entirely different in phraseology from what was charged in the complaint. Indeed, plaintiff himself testified that he did not state in what manner the commission was claimed to have been given. There was, therefore, down to the time of the motion to dismiss, at the close of plaintiff's case, a failure of proof to support the cause of action. The trial judge, however, refused a nonsuit, and defendant was examined; and, after he had rested, Mr. Merritt, the gentleman with whom the conversation took place, was called in rebuttal. I fail to find, even in his evidence, sufficient to make out, with what had gone before, a *prima facie* case. He said that defendant told him: "We have done a little work for Mr. Bond, and loaned him some money which he has never paid." But he failed to show anything tending to support the innuendo relied on. There is no proof of the alleged ironical inflections of voice, glances, gestures, and movements. There is nothing to indicate that these words were not spoken in their ordinary sense, with no intention that any different meaning should be drawn from them. The court directed the witness to state the whole conversation, and the only material thing added was that Mr. Brewster said he did not expect to be paid for the work done or money loaned. As far as we can judge from the evidence as it appears in print, the natural impression for a fair-minded man to draw from the whole interview was that defendant did not intend to convey the idea that the printing and money loaned were in lieu of reward or commissions for business in-

Bond v. Brewster.

fluenced in defendant's favor by plaintiff. Certainly the evidence falls short of affirmatively proving an intent to slander. The whole gist of this action is not in words which of themselves were innocent, but in an alleged something, emanating from defendant, in addition to and accompanying the words. Even if Mr. Merritt got an erroneous impression, there is nothing to show that any utterance or action of defendant is responsible for it. When he called upon defendant, he was evidently prejudiced against plaintiff by statements that had been made to him by Mr. Thompson. If the words uttered by defendant were colored in Mr. Merritt's mind by Thompson's previous charges, certainly defendant should not be held liable for the unjust imputation, unless he himself said or did something by which he intended, directly or by innuendo, to slander the plaintiff, or from which such imputation might fairly be inferred. The case is barren of any evidence of this kind, and, for the reason that there was a total absence of proof to support the cause of action, the complaint should have been dismissed; and the judgment appealed from should be reversed, with costs.

BISCHOFF, J., concurred.

J. F. DALY, J.—The plaintiff was in the employ of the Waterbury Watch Company, as advertising agent, editor, and publisher of a monthly publication issued by that company. He gave the work of printing the paper to the firm of Fleming, Brewster & Alley, of which defendant was a member, from July to November, 1888, when, owing to their delay in doing the work, he took it away from them because his employers charged him with neglecting the business. The defendant called upon plaintiff about the matter, and when he left was very angry, and said that he would see that plaintiff regretted his action. After this, Mr. Merritt, the manager of the Waterbury Watch Company, called upon the defendant and told him that he was upon an investigating tour in relation to Mr. Bond (the plaintiff); asked if he

Bond v. Brewster.

knew why the work was taken away from his house. Defendant said he did not know, exactly; Bond had claimed the company was dissatisfied at his not getting the paper out promptly, and had taken it away on that account. Merritt then said: "Have you ever paid Bond any commission?" Defendant said: "No." Merritt then said: "Well, I have heard some things about Mr. Bond that are with regard to commissions that I was investigating. I thought I would come up, and see if you knew anything about why he took the work away,—whether he had any idea about it." Merritt then told defendant a circumstance about a Mr. Thompson, who claimed that he used to do the company's work, and afterwards there was a job that the company had done, which Merritt supposed Thompson was doing, but it was given to somebody else. Merritt told defendant that he spoke to Thompson, who said: "We don't pay commissions to any of your employes is the reason we don't get your work." That Merritt asked him what he meant by that, and Thompson said he had been compelled to pay the company's advertising agent, and, as they had but one, and that was Mr. Bond (the plaintiff), Mr. Merritt supposed it was Mr. Bond. Upon hearing this, the defendant said to Merritt: "We have done a little work for Mr. Bond, and loaned him some money which he has never paid." Also, that "he did not expect to be paid for the work done and money loaned to Mr. Bond." Merritt went away, consulted with his "folks" in relation to it, and, as he was about going to Europe in a short time, "made pretty short work of it," and discharged Mr. Bond. The defendant was perfectly calm during this interview. Merritt was asked on cross-examination, by defendant's counsel, whether Mr. Brewster did not speak of the work done for Mr. Bond as one of the ordinary courtesies of business, but Merritt's answer was: "It is difficult for me to say that he did." Subsequently to the plaintiff's discharge from the employment of the company, he called upon defendant, and said: "Brewster, I don't understand how you could permit yourself to induce Mr. Merritt, the manager of the Waterbury

Bond v. Brewster.

Company, to believe that I had withdrawn work from you because you declined to pay a commission, or give me some consideration for it; nor can I understand that you induced him to believe that you ever gave me a consideration. I understand that you told Mr. Merritt that I had exacted a commission from you; and you know it is false, and I don't understand why you should make it." The defendant was confused for a moment, and did some figuring on the desk with his pencil, and then turned to the plaintiff, and said: "Well, Bond, I did wrong, I admit. I don't know why I should have said that you received a commission from me, or why I should have induced Mr. Merritt to believe it, when there was no truth in it." Plaintiff then said: "Mr. Brewster, I think you don't, or didn't then, appreciate the injury you were doing me. Not only was that the cause of my losing my position, but it has also seriously injured my reputation." To which defendant answered: "I regret it very much. I was angry at the time I said it, and there was no truth in it."

The jury, the sole judges of the fact, have by their verdict established the truth of the evidence given on plaintiff's behalf where it conflicts with defendant's testimony; and from the facts, as detailed above by the plaintiff and Merritt, they were justified in finding that the defendant, out of a feeling of resentment towards plaintiff for having taken his work away, seized upon the opportunity offered by Merritt's inquiries to do the plaintiff an injury, by insinuating, if not openly charging, that he had exacted a commission, in the shape of gratuitous services and pretended loans, contrary to the duty he owed his employers. The words begin with a denial that commissions were exacted, but they were immediately followed by a statement of fact calculated to convey an exactly opposite impression; and spoken, as they were, to plaintiff's employer, with the knowledge that he was investigating alleged offenses of that character on the part of plaintiff, the words were certain to give the impression that the offense had been committed, and, being spoken of plaintiff in his capacity of employe, and with reference to his

Bond v. Brewster.

duties, they were actionable *per se* (*Fowles v. Bowen*, 80 N. Y. 20).

The evidence of Merritt substantially sustains the allegations of the complaint as to the words alleged to have been spoken. The words as set forth in the complaint are: "We have not paid him any commissions. We have lent him money which he has not repaid. We have done printing for him for which no charge has been made." No question can arise as to the proof substantiating the charge in the complaint. The appellant's objection on this ground was not well taken. Nor can it be, with any show of reason, urged that the words were, considered in connection with the circumstances under which they were uttered, innocent, or that they did not impeach the integrity of plaintiff in his vocation, or were not defamatory in their nature. All appellant's arguments on this point are based upon the theory that the defendant expressly stated that plaintiff did not exact a commission, and that what was further said was the mere statement of a harmless fact; but the plain intent of the words was to accuse plaintiff of taking what was equivalent to a commission. It was as if defendant had said: "We have not paid him a commission directly, by way of a percentage upon the work, but we have done so indirectly, by making pretended loans which we do not expect to be repaid, and by doing work for which we do not expect any payment." The jury so understood the language, and no one could misunderstand it. As the words were actionable *per se*, it was not necessary to prove special damage. If it had been, however, the discharge of plaintiff from his employment seems to have been the direct consequence of the defendant's slander. He was charged with having caused plaintiff to lose his situation, and he did not deny it.

The exceptions were not well taken. There was no error in admitting evidence of plaintiff's business relations with his employers. As the alleged slander was with respect to his business and duties, how could he prove his case without such evidence? The language of the court, "I think it may be

Bond v. Brewster.

important to show that, as showing a motive which led to the utterance of the slander," in admitting the evidence, was not the subject of exception on the ground that the jury might regard it as an adjudication that a slander had been uttered. No evidence of slander had been then given, and the jury could not have construed it as referring to anything but the slander as alleged, but not yet proved.

Appellant argues an "exception at folio 21," but no such exception is in the case. There is an exception to the allowance by the court of evidence to show that the charges which Merritt told defendant one Thompson had made against plaintiff did not refer to the latter. Without this proof the jury might have regarded the plaintiff as actually guilty of the offense charged by Thompson, and I think it was proper to permit him to show that that charge was not true. The argument of defendant, however, is that the jury were influenced by it, as it tended to shift upon him the results of the words uttered by Thompson. But the judge, in allowing the testimony, expressly stated that defendant was in no way responsible for the truth or falsity of that statement, and that he should so charge the jury. But the evidence itself would not have the effect suggested by the appellant. It was merely the statement by Merritt that he had since learned that the charge of Thompson did not refer to plaintiff. The jury, therefore, might still consider that the discharge of plaintiff by Merritt was as much due to Thompson's charges as to defendant's, since it was only after the occurrence in question that he learned of plaintiff's innocence. Error is alleged with respect to a refusal to charge, to which defendant excepted, but the error is not pointed out on the brief, and upon reading the case I do not find any. The other exceptions in the case are disposed of by the conclusions arrived at above in respect to the main questions in the case.

The judgment should be affirmed, with costs.

Judgment reversed, with costs.

Brockman v. Buell.

MARY BROCKMAN, Respondent, *against* HENRY BUELL, Appellant.

(Decided April 7th, 1890.)

A chattel mortgage given to secure a sum of money payable one day after its date is not a mortgage payable on demand, and the commencement of an action to recover possession of the mortgaged property is a sufficient demand.

In an action to recover possession of chattels mortgaged to plaintiff, consisting of a horse valued at \$200, and harness and blankets valued at \$50, the evidence as to value was uncontradicted, but the court awarded judgment for \$40 only. *Held*, that the court on appeal could not render judgment for the full value of the property, but must reverse the judgment, and order a new trial.

APPEAL from a judgment of the District Court in the City of New York for the Fifth Judicial District.

The facts are stated in the opinion.

L. H. Dickerson, for appellant.

B. Hoffman, for respondent.

LARREMORE, Ch. J.—This action was brought by the plaintiff to recover possession of one sorrel horse valued at \$200 and one set of blankets and harness valued at \$50. The answer is a general denial and demand for a bill of particulars. Issue was joined in the court below and judgment rendered on December 27th, 1889, in favor of the plaintiff for \$40, with costs.

Plaintiff claims as mortgagee in possession of the property and brings suit for the return thereof or its value. The mortgage in question was given by the defendant to the plaintiff to secure the sum of \$800 one day after the date thereof. In such case no demand was necessary, it not being a mortgage payable on demand, and the commencement of the action constituted such demand.

Close v. Clark.

As the court below found in favor of the plaintiff, thereby establishing her right to recover the property or its value, it is somewhat difficult to understand the reason for the amount awarded. The testimony appears to be undisputed that the value of the horse was \$200. Evidently the court did not take this into consideration in assessing the damages. We are asked to render a judgment in plaintiff's favor for the value of the horse; this is not the province of an appellate court. The judgment appealed from must be reversed and a new trial ordered, with costs to abide the event.

BISCHOFF, J., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

HENRY CLOSE *et al.*, Respondents, *against* MATILDA CLARK
et al., Appellants.

(Decided April 7th, 1890.)

A provision in a contract to build a house that the work shall be completed by a certain time and paid for on completion, does not make time of the essence of the contract, and is waived where alterations are made in the plans by mutual assent, or where, after the expiration of the time, the owner notifies the contractor to complete the work.

A mechanic's lien is invalid where founded upon a notice of lien filed by a contractor for the unpaid balance of the whole contract price, which states that all the work and materials have been performed and furnished, when in fact part of the work was unperformed, and some of the materials not furnished.

Under a general denial in an action to enforce a mechanic's lien, filed for the unpaid balance of a contract to furnish all the work and materials in a building, defendant may show that he furnished part of the materials or is liable as guarantor or surety for plaintiffs thereon.

APPEAL from a judgment of this court entered upon a report of a referee.

Close v. Clark.

The facts are stated in the opinion.

W. Stebbins Smith and Jacob Fromme, for appellants.

Samuel E. Duffy, for respondents.

LARREMORE, Ch. J.—This action was brought for the foreclosure of a mechanic's lien. The complaint, among other things, alleged that plaintiffs "did and performed certain work, labor and services, and furnished necessary materials therefor, which work and materials consisted of building and erecting on the premises above described a house or building according to the terms and conditions of the said contract."

We think the learned referee erred in his findings as to what the contract referred to in the complaint actually was. This agreement was in writing, and was executed in duplicate. The copies correspond, except that after the signatures in the one retained by defendants and produced by them at the trial was added the following: "P. S. The whole building to be finished on or before the 1st day of January, 1888, A.D." We think the weight of evidence is strongly in favor of the view that this postscript was added, after the signing doubtless, but still, upon the same occasion, and in the presence and with the consent of all the parties. Such postscript being orally assented to, was, therefore, as binding as the foregoing instrument actually subscribed, and in reality became an integral part of the agreement under which the work was done (*Dutch v. Mead*, 36 N. Y. Super. Ct. 427, 59 N. Y. 628). But though the weight of evidence substantiates defendants' claim as to the contract, and though the referee erred in this respect, we cannot see that any actual harm resulted from such error; and we should not reverse upon this ground. It appears that there were departures by mutual consent from the original plan, and, furthermore, that after the time prescribed by the contract had expired the defendant Clark notified plaintiffs to go on and complete. Under competent authorities, either of these circumstances would operate as a waiver of the time condition in the con-

Close v. Clark.

tract. It has also been directly held that in a contract of this character a provision that the work shall be completed by a certain date and paid for upon completion, does not make time of the essence of the contract; and that if the builder proceeds afterwards with the assent of the other party he may recover at the contract price (*Dillon v. Masterson*, 39 N. Y. Super. Ct. 133).

This lien was filed for the unpaid balance of the whole contract price. In the notice of lien it is stated that all the work and materials had been actually performed and furnished. Leaving out of consideration a large number of departures from the contract which the referee finds were waived or assented to, he finds directly that in several particulars, more or less substantial, the contract was not completed. He finds that work and materials to the value of \$93 were required to complete the same. I cannot see, therefore, why, on respondents' own showing, the present case does not come squarely within the reasoning of *Foster v. Schneider* (50 Hun 151). The material fact is not that the builders had completed their contract, but in an inferior manner; it is that they had not completed it at all. The referee's sixth finding of fact specifies several omissions, all of them of some importance. The plaintiffs entirely failed to supply these articles although notified to do so. They cannot argue that their statement in the notice of lien arose from a pardonable difference of opinion, they holding that they had in all respects kept their agreement, and the referee having disagreed with and found against them only as to the quality of their work. Confessedly they had not attempted to provide several things called for by the contract. We think, therefore, the allegation in the notice was untruthful, and might have been misleading to subsequent lienors and the public, and, for the reasons given in the opinion in *Foster v. Schneider* (*supra*), the lien must be declared invalid.

There is also an exception in the case which deserves notice. On the examination of Matilda Clark, the defendant, she was asked: "Q. Now did you do anything in reference

Close v. Clark.

to the lumber in the house with Mr. Close? (Objected to as having nothing to do with this case. Counsel for defendants states that this question is asked for the purpose of showing that the defendant, Mrs. Clark, and not the plaintiffs, furnished the lumber that went into the house in question. Objection sustained. Exception by defendants). Q. Did the plaintiffs furnish all the materials that the contract called for to build the house? A. No, sir. Q. What portion of the materials did they not so furnish? A. The lumber. Q. How much? A. All the lumber in the house. Q. Who furnished it? A. I went security for it. Q. Do you remember the cash amount of lumber not furnished by them? (Objected to on the same grounds. Sustained. Exception by defendants)."

We think the defendants should have been given the fullest opportunity for showing what this arrangement between the parties as to the lumber was. The learned counsel for respondents contends that no evidence of this character was admissible because the answer is a general denial, and that by the authority of *McKyring v. Bull* (16 N. Y. 297), payment, or part payment, cannot be proved as a defense under such a pleading. But this testimony would properly come in under a general denial, as tending to show that plaintiffs had not done one very important thing they allege they did in the complaint, *i.e.*, furnish all the materials for the house. If the defendant herself furnished such lumber, this allegation of the complaint would be effectually disproved. By the referee's action in admitting part of the testimony on this point, and excluding the rest, we are left in the dark as to what the actual transaction was. But it certainly appears that defendant claims that she supplied the lumber. If this were the fact, even if the notice of lien had contained no untruthful allegations, she would certainly have been entitled to a very substantial deduction from the contract price. If the original credit was given to plaintiffs, but defendant was obliged to go security for it before it could be obtained, and is still liable as guarantor or surety for the unpaid lumber bill, we do not

Close v. Clark.

think that plaintiffs "furnished the materials" within the meaning of their contract. They used merchandise which would not have been supplied but for defendant's credit. The practical result of holding that they absolutely furnished the materials, and were absolutely entitled to the full balance of the contract price, under such circumstances, might be to turn the money over to irresponsible persons, and leave defendants without redress to pay for the lumber a second time. Under this state of affairs, if the lumber merchant was willing to trust to defendants' responsibility, he would not be compelled to file a lien, and defendants would not receive even that protection. This is an action in equity, and the court would therefore use every effort to do substantial justice between the parties, and it seems to me, under the hypothesis last stated, would have power to withhold the amount of the lumber bill from plaintiffs on the ground that they had not furnished the materials, especially if defendants stipulated that the judgment contain a provision requiring her to pay the amount directly to the lumber merchant.

We are, of course, discussing a hypothetical case. If defendant has actually paid for the lumber, her right to prove the amount and claim deduction thereof could not be questioned. What has been said shows the necessity that existed, in any view of the controversy, of bringing out fully the facts of this transaction.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

J. F. DALY and BISCHOFF, JJ., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

Cohen v. Hershfield.

MARKS COHEN, Respondent, *against* BERTHA HERSHFIELD,
Appellant.

(Decided April 7th, 1890.)

A real estate broker cannot maintain an action against the purchaser he obtained, for commissions alleged to have been lost through the fraud and deceit of such purchaser in representing another person as the procuring cause, to whom the owner was thereby induced to pay such commissions. Plaintiff's right of action against the owner is in no way lost by such payment.

APPEAL from a judgment of the District Court in the City of New York for the Second Judicial District.

The action was brought to recover damages for the loss of commissions as broker on a sale of real estate, alleged to have been lost through the fraud and deceit of defendant. From a judgment for plaintiff, defendant appeals.

Lewis Johnston, for appellant.

Christopher Fine, for respondent.

BISCHOFF, J.—Plaintiff, a real estate broker, was employed as such by one Blumberg, to sell the latter's house, N° 306 Henry Street in the City of New York, and, acting in pursuance of such employment, he procured a purchaser in the person of the defendant. Thereafter, as plaintiff claims, the defendant, conspiring with her brother, one Lappart, to cheat and defraud him out of his commissions from Blumberg, concealed the fact that she became such purchaser through the efforts and instrumentality of the plaintiff, and, falsely and fraudulently, and with intent thereby to deceive him and to induce him to pay such commissions to Lappart, represented to said Blumberg that she was unacquainted with plaintiff, and that she was induced to purchase solely through the efforts of Lappart. Plaintiff further alleges that, relying upon such representations, Blumberg was induced to pay,

Cohen v. Hershfield.

and did pay, the amount of such commissions to Lappart, and that thereby such commissions were lost to him, and he seeks in this action to recover the amount of his alleged damage from the defendant. In the court below plaintiff was allowed to recover.

It is difficult to conceive upon what principle of law the judgment can be sustained. Admitting every fact relied upon by the plaintiff, he has utterly failed to show a cause of action, and the complaint should have been dismissed upon defendant's motion. Blumberg chose, at his own peril, to determine Lappart's claim to the commissions by payment thereof to him, and it has been repeatedly held that if a debtor pay the amount of his indebtedness to one of two or more persons asserting opposing claims thereto, the person to whom payment was made is not liable to the person subsequently proving himself entitled to payment, for the amount received. See *Patrick v. Metcalf* (37 N. Y. 334).

In *Butterworth v. Gould* (41 N. Y. 436), approving of and following *Patrick v. Metcalf*, the Court of Appeals hold it to be a principle well established by authority that "Where a defendant has received money due to the plaintiff, but claiming it as his own under circumstances in which he has no authority from the plaintiff, and does not act under any pretense of such authority, and the payment to him is made in proposed recognition of his title thereto, as his own, and does not operate to discharge the payor from his liability to the plaintiff, then and in such case there is no trust, and no implied promise to pay the money to the plaintiff."

Applying the principle referred to to the facts claimed by the plaintiff, it is apparent that he is not entitled to recovery against Lappart, the actual recipient of the commissions in question, and there is much less ground for holding the defendant. No fraud or misrepresentation was practiced upon the plaintiff. He parted with nothing on the faith of any representations of the defendant, and his right to commissions from Blumberg, at whose request he rendered the services leading to the sale, remains intact, and is in no wise or man-

Devlin v. Farmer.

ner abridged or affected by payment of the commissions to Lappart. How then has plaintiff been damaged? If fraud and deceit were intended, it was not upon plaintiff, but upon Blumberg, who paid the commissions to Lappart. Blumberg might complain, but clearly not the plaintiff, and fraud without damage does not confer a right of action (*Taylor v. Guest*, 58 N. Y. 262, 266).

The judgment appealed from must be reversed, with costs, and a new trial ordered.

LARREMORE, Ch. J., concurred.

Judgment reversed, with costs, and new trial ordered.

ANNIE A. DEVLIN, Appellant, *against* ANN FARMER, as Administratrix, &c., of Henry Fitzsimmons, Respondent, Impleaded with The Greenwich Savings Bank.

(Decided April 7th, 1890.)

At the trial before a referee of an action for money in a savings bank, claimed by plaintiff as a gift to her by her uncle, since deceased, made by him in expectation of death, plaintiff's husband testified that deceased, having had the bank books brought to him, gave them to plaintiff, saying, "You keep them. They are for you;" and that he said he thought he was going to die, and he wanted everything that was there to belong to her. This was corroborated by plaintiff, so far as she could testify, as well as by testimony of another witness to declarations of deceased, and by plaintiff's possession of the bank-books and other circumstances; while against it was only negative evidence as to matters not in themselves very material. *Held*, that the referee was not justified in disregarding the husband's testimony as improbable, and that, as the words testified to by him were sufficiently definite to create a gift of the bank accounts, a judgment on the report of the referee in favor of defendant should be reversed.

APPEAL from a judgment of this court entered on the report of a referee.

The facts are stated in the opinion.

Devlin v. Farmer.

William H. Arnoux and Francis C. Devlin, for appellant.

Abram Kling, for respondent.

LARREMORE, Ch. J.—This action was originally brought by plaintiff against the Greenwich Savings Bank to recover the amount of an account therein opened by the Reverend Henry Fitzsimmons, deceased, in his life-time. The plaintiff contends that the said deceased, who was her uncle, made to her a *donatio causa mortis*, in due form, of said account, a short time previous to his decease. The defendant, appellant, is the administratrix of the original depositor of the money, and, as she also claims such money in said bank as an asset of the estate, the bank interpleaded by order in proper form and duly entered, and this litigation has been conducted between the rival claimants to the fund.

The testimony principally relied upon to establish the gift was that of plaintiff's husband, and was in effect as follows: "Question. When you were there (at the residence of the deceased), in his life-time, did he have any conversation with you about his illness and his anticipation of death? Answer. Yes, sir. He said he thought he was going to die. He wanted me to do something for him. He said he was out of money, and he wanted to sell some bonds that he had, and either bring him a certified check or money for the bonds, and he would use it, as he had been using some money of Mrs. Devlin's prior to that, and he gave plaintiff the key of a trunk to get them. I was sitting by the bedside, talking to him, reading a paper. He was sick in bed at the time. He told plaintiff to bring him a parcel, in my hearing, and he gave her the key of the trunk. I saw him hand her the key. She brought it down and handed it to him. He took the parcel and opened it. He took out three bonds. I think 5-20's they were. He took out the books and gave them to Mrs. Devlin. Q. You mean the bank-books in question? A. Yes, sir. Q. What did he say? A. Mrs. Devlin said 'What am I to do with them?' He says 'You keep them. They are for you.' He said he thought he was going to die,

Devlin v. Farmer.

and he wanted everything that was there to belong to her. Everything he had." Also, upon cross-examination, said witness further testified as follows: "He handed these books to Mrs. Devlin. She asked him what she should do with them. He said for her to keep them. They were for her. He said that if he got well she should give them back to him. If he did not they were hers, and everything that belonged to him."

The learned referee evidently discredited the account given by plaintiff's husband of the alleged gift of the bank-books. His testimony was not contradicted, or in any manner directly attacked, but the referee found for defendant, presumably upon the inherent improbability of the facts averred in plaintiff's behalf. I have not overlooked that, in the decision of this question of fact, direct contradiction could not be produced, as the conversation in which the alleged *donatio causa mortis* took place was had between the deceased and plaintiff's husband, with no other person but plaintiff herself present. A court is not bound to grant a judgment upon the uncorroborated testimony of a single witness, especially if he be an interested witness, and his evidence in itself does not seem reasonable. Though the referee wrote no opinion, and we can only surmise as to the reasons that led him to dismiss the complaint, it nevertheless seems evident that he considered Mr. Devlin's testimony so improbable, and his interest in his wife's claims such a strong motive for perjury, that his story was to be entirely disregarded. After a careful examination of the case, I have concluded that in the interests of justice a new trial should be ordered.

In the first place, the testimony of James Devlin, as to the delivery of the books and the accompanying words, is direct and straightforward. He is corroborated by his wife, the plaintiff, as far as she was permitted to testify. Then there is an undisputed fact, which to my mind furnishes very strong corroboration of Devlin's story, and that is the actual possession of the bank-books by plaintiff from the day of the alleged gift by the deceased down to the present time. Un-

Devlin v. Farmer.

less the deceased did give the bank-books to plaintiff, then, for some purpose, she stole them, and, in order to discredit plaintiff's evidence in this summary manner, we would be obliged to presume that she and her husband had committed larceny as well as perjury. The appellant practically concedes that plaintiff came rightfully into possession of the books, and the theory of a trust is suggested to explain such possession. There is no evidence, however, to charge plaintiff as trustee, except it be the alleged, mysterious conversation between plaintiff and appellant, at which the latter avers that plaintiff said that she had \$600 for her (appellant) if she would keep still. Plaintiff denies this conversation absolutely, and, even if it were true, there is nothing to connect the \$600 with the bank-books, or to make it seem like anything more than the promise of a gift of that amount. On the other hand, granting, as defendants substantially do, that the bank-books came lawfully into plaintiff's hands, at or about the time when she swears they did, the corroborative testimony of the witness Mary Duffy becomes very significant. She is obviously friendly to plaintiff, but does not appear to be a strongly interested or a biassed witness; nor was her evidence materially weakened by cross-examination. She says: "I knew there was a trunk in a closet. It was always kept there. Father Fitzsimmons carried the key to it himself." "Question. Did you ever see him give that key to Mrs. Devlin? Answer. Yes, sir. One morning after Mr. Devlin came he was sitting at the foot of the bed, and Mr. Devlin was beside him, and he called me to him. I was in the room with a dust-pan and brush. I don't remember that I had done anything in the room. I don't know whether I had started to do anything; but I intended to; and he asked me to get his pants. I gave him the pants, and he took the key out of the pocket and gave it to Mrs. Devlin; and I went out of the room. This was some time in April. Q. You left before he had time to say anything? A. I left the room because I supposed I was not wanted. Q. Did you ever hear him say anything about books? A. Yes, sir;

Devlin v. Farmer.

I did. He did not say bank-books. He said it in this way. He was after sleeping, and I gave him a drink. Mrs. Devlin was in New York, and I don't know whether she stayed one week or two. Before she returned I was left in charge to give him his medicine and to see to him as she told him. When I gave him the drink he said, 'I gave Annie the books, and if I want them back she will give them to me.' The account of the transaction receives further slight corroboration from the fact that plaintiff's husband actually did carry the bonds, which were taken from the trunk at the same time with the bank-books, to New York, and converted them into money, and that he sent the amount thereof in the form of a check or draft to the decedent, by plaintiff, on her return to Wilkesbarre. This circumstance is very clearly established. Of course, plaintiff may, when she went to the trunk at her uncle's request to get the bonds, have feloniously, and without his knowledge, abstracted the bank-books, but, as far as can be judged from the evidence in its printed form, and especially in view of the testimony of Mary Duffy, I should have been loath to adopt that theory.

The evidence offered by defendant consisted of assertions on the part of various members of the family that they had not heard of plaintiff's claim of title to the books until a long time after she received them, and the alleged conversation between plaintiff and Ann Farmer, above referred to, about the gift of \$600.

These were, of course, circumstances to be considered and weighed; but it is by no means conclusive against the good faith of plaintiff's contention, although it may have been imprudent, that she kept silent, if she supposed that her right would be immediately disputed and attacked. The alleged conversation between the parties about the \$600 is too vague to have much practical force of any kind. On the one side we have positive testimony, and a consistent and coherent statement of facts, corroborated as before shown in many material points. On the other we have only negations of matters not in themselves very material. One of the points,

Devlin v. Farmer.

upon which great stress was laid by the learned counsel for the respondent to discredit the probability of plaintiff's evidence, was that both she and her husband testify that they have not had any private conversations with each other about these bank-books or this litigation. This fact may seem strange at first sight, but, on the other hand, it must be remembered that the plaintiff's counsel, who is also the brother of her husband, resides with them, and she avers that she has had many and constant consultations with him. A point was also made of the fact that the words of the decedent, relied upon to establish this cause of action, were broad enough to give plaintiff all of his possessions as well as the bank-books in question, and that she has never attempted to assert any rights thereunder except to claim the savings-bank deposits. But Father Fitzsimmons' language, as reported by James Devlin, was sufficiently definite to create a gift of the bank accounts, and not definite enough to carry anything else. The valid portion of the gift would not be vitiated by any other words that accompanied it, and it does not seem at all unnatural that plaintiff never supposed for a moment that her uncle could have intended any specific gift at that time except that conveyed by the bank-books which he simultaneously handed over. There seems such a strong probability that the referee did not decide according to the weight of evidence that the judgment should be reversed and a new trial ordered, with costs to abide the event.

J. F. DALY and BISCHOFF, JJ., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

Dilling v. Draemel.

KARL DILLING, Respondent, *against* WILLIAM DRAEMEL,
Appellant.

(Decided April 7th, 1890.)

Plaintiff's goods, insured against loss through collapse of building, were injured by the fall of a wall of the building in consequence of his landlord's excavating on an adjoining lot, and he brought action against the landlord therefor. The action was settled on payment of a certain sum, and a release under seal was given against all claims or demands whatsoever. *Held*, that such release barred a subsequent action by plaintiff on his insurance policy to recover any part of such loss, as it destroyed the right of subrogation of the company.

APPEAL from a judgment of the District Court in the City of New York for the Fourth Judicial District.

The facts are stated in the opinion.

Simon Sultan, for appellant.

Shorter & Schaffer, for respondent.

LARREMORE, Ch. J.—The plaintiff held a certificate as a member of a voluntary association insuring his furniture and household goods against loss, “either immediate through fire, explosion, or collapse of building, or mediate through water in extinguishing the fire.” Subsequently the easterly wall of the house he occupied fell in consequence of an excavation made upon an adjoining lot. Plaintiff in the first instance claimed that his landlord was liable to him in tort as a wrongdoer by reason of the falling of the wall, and brought an action against him to recover damages for the loss, among other things, to his goods, merchandise, and other property. The action was settled in consideration of \$300, paid by his landlord to the plaintiff, whereupon he executed and delivered to the latter a general release under seal against all claims, dues, and demands whatsoever. Thereafter he brought this

Dilling v. Draemel.

action to recover that proportion of his loss over the amount of \$300, claiming that he had a discretion at his own pleasure to apportion such loss. He recovered a judgment, from which this appeal is taken.

The case was decided in the court below upon the theory that the plaintiff had not received all the damages sustained by him from the wrongdoer, and that, although he had absolutely released the wrongdoer, such action might be maintained.

It is well settled that if a loss under a policy of insurance is occasioned by the wrongful act of a third party, the insurer occupies the position of a mere surety, and the wrongdoer that of a principal debtor; and all the incidents of suretyship attach to the position of the underwriter in such a case, including the right of subrogation (*Hall v. Nashville, etc., R. Co.*, 13 Wall. 367, 373). The same principle is applicable to a contract of insurance if the surety destroys the remedy of subrogation, and relieves the assurer to the full extent to which the wrongdoer could have been made liable for the loss (*Sheldon on Subrogation*, § 222; *Atlantic Ins. Co. v. Storrow*, 5 Paige 285).

Both parties rely upon the case of *Connecticut Fire Ins. Co. v. Erie R. Co.* (73 N. Y. 399). A careful examination of that case shows that it is an authority against the ruling of the court below. That action was brought by an underwriter to recover from the Erie Railroad Company, under the right of subrogation, the amount paid by the underwriter to the assured; a release was given by the assured to the company, which was not absolute in terms as is the release in this case. The release in the case cited contained a statement that the settlement did not include any claim the assured had against the underwriter, and the court held that because of that reservation the right of subrogation of the underwriter was preserved as against the railroad company, and that the release was limited and by its terms preserved the rights of the insured to collect what the insurance company owed him. The release in this case is a general absolute release without

Dreher v. Connolly.

any such reservation, and the \$300 paid cannot be considered as a payment *pro tanto* for the loss. Such a release destroyed the right of subrogation. If the assured by his own act absolutely and without reservation releases the wrongdoer, he thereby discharges the insurer to the full extent to which he has defeated the insurer's remedy over by right of subrogation (*Atlantic Ins. Co. v. Storrow, supra*; *Carstairs v. Mechanics &c. Ins. Co.*, 18 Fed. Rep. 473).

The judgment appealed from should be reversed, with costs.

BISCHOFF, J., concurred.

Judgment reversed, with costs.

HENRY E. DREHER, Respondent, *against* PATRICK CONNOLLY
et al., Appellants.

(Decided April 7th, 1890.)

A judgment for plaintiff in an action to recover for goods sold for a liquor store, will not be reversed where there is evidence that defendants owned the saloon, and after their alleged sale to another permitted their firm name to be continued without any indication of change of ownership.

APPEAL from a judgment of the District Court in the City of New York for the Fourth Judicial District.

The facts are stated in the opinion.

J. T. Cornell, for appellants.

N. S. Levy, for respondent.

BISCHOFF, J.—Notwithstanding the positive denial by the defendants of the purchase of the merchandise for the recovery of the value of which this action was brought, there appears from the examination of the evidence sufficient to

Frost v. Craig.

sustain a finding that at the time of the sale and delivery the defendants were the owners of the saloon at 810 Bowery, at which, and for the use of which, the merchandise was delivered, and that by permitting their firm name to be continued after the premises had passed into the possession of McGonigle without any indication of change of ownership, the plaintiff's assignor was justified in assuming that defendants continued to be the owners at the time of the sale and delivery of the merchandise in question, and that thereby the defendants were estopped from denying that the sale was to them and upon their credit.

The appellate court will not reverse a judgment of the court below on a mere conflict of testimony, if there is sufficient evidence to support it, although on the whole evidence the appellate court might have arrived at a different conclusion (See *Fizman v. Brown*, 14 Daly 110; 3 N. Y. St. Rep'r 608).

LARREMORE, Ch. J., concurred.

Judgment affirmed, with costs.

JAMES M. FROST, Respondent, *against* DANIEL D. CRAIG,
Appellant.

(Decided April 7th, 1890.)

An order in supplementary proceedings required a judgment debtor to deliver to the receiver appointed in such proceedings, a policy of insurance on the debtor's life, which he alleged he had assigned as security for an indebtedness due from him to an estate of which he was executor. *Held*, it appearing that such policy was then in the hands of the substituted trustee for the estate, and claimed by him as such security, that the judgment debtor's right to possession was "substantially disputed" within section 2447 of the Code of Civil Procedure, and the order should be so modified as to require only that the judgment debtor assign to the receiver the policy and all his right, title, and interest therein, so that the receiver might take proceedings to recover it from the substituted trustee.

Frost v. Craig.

An order for examination of a debtor in supplementary proceedings, and a subsequent warrant for his arrest in such proceedings, are independent, and the vacating of the order does not affect the warrant.

A motion to vacate a warrant in supplementary proceedings waives all irregularities in the recitals not specified therein.

APPEAL from an order of the General Term of the City Court of New York, affirming an order of that court in supplementary proceedings, requiring the debtor to deliver certain property to the receiver.

The facts are stated in the opinion.

Albert I. Sire, for appellant.

S. H. Little, for respondent.

J. F. DALY, J.—This is an appeal by the judgment debtor, from an order of the General Term of the City Court, affirming an order made by that court in proceedings supplementary to execution, requiring him to deliver to Isaac L. Falk, receiver appointed in such proceedings, a life insurance policy for \$2,500, issued by the Mutual Life Insurance Company of New York, upon the life of the judgment debtor.

The judgment debtor claims to have transferred the policy in question as security for an indebtedness due from him to the estate of Henry Baird, of which he was executor. No definite statement as to the amount of such indebtedness is made by him, or by any other person. He testifies generally that he owed the estate \$1,500 to \$1,600; that he took it and some bonds; that he invested some money of the estate in bonds and transferred those bonds to some creditor of his, or disposed of them, he does not remember which. The present holder of the policy, Lewis T. Janes, the substituted trustee of the said estate, makes no statement; but his attorney, A. W. Cutler of New Jersey, swears that he holds the policy as security for indebtedness of the judgment debtor, but is not able to say what the exact indebtedness is, but is satisfied that it exceeds \$2,500. J. C. Youngblood, the attorney for the judgment debtor in matters relating to the said estate, swears

Frost v. Craig.

that he has the vouchers of the latter in his hands, and after giving him credit for moneys expended on account of the estate, he is indebted to it in a considerable sum, the amount of which cannot at this time (owing to the ill-health of the judgment debtor) be ascertained.

But although there is no definite statement showing an actual indebtedness from the judgment debtor to the Baird estate, the fact appears to be that he has assigned the policy to his successor, the substituted trustee, as security for an alleged or admitted indebtedness, and that it may be the right and duty of the latter as such trustee to refuse to deliver the policy until required by law to do so. Under such circumstances the right of the judgment debtor to the possession of the property may be said to be "substantially disputed" within the terms of the Code (§ 2447), and the order made in the supplementary proceedings should be, not that the judgment debtor deliver the policy to the receiver, but that he assign and convey to the latter the said policy and all his right, title and interest therein, so that the receiver may be in a position to take proceedings to recover it from Janes, the trustee, if the latter has no right to retain it. The order appealed from should be modified accordingly, without costs of this appeal to either party, and as so modified, affirmed.

The judges of the City Court properly decided that the warrant upon which these proceedings were instituted (Code, § 2438), was independent of the previous order for examination, and that the vacating of such previous order did not affect the warrant. The Code permits the supplementary proceedings to be instituted by warrant instead of by order (§ 2437), and also permits the warrant to be issued at any time after an order is granted; but it does not appear that in the latter case the subsequent vacating of the order requires the vacating of the warrant. The section provides that the judge may, if necessary, direct the adjournment, or if the return day of the order has elapsed, the continuance of the proceedings under the order, until after the return of the warrant and his decision thereupon. This shows that the

Hames v. Judd.

judgment creditor may abandon the proceedings instituted by the order, and elect to proceed under the warrant, or may keep the proceedings under the order alive until his right to proceed under the warrant is established. But the complete independence of the two proceedings is thus clearly indicated.

The appellant cannot take advantage of any irregularities in the recitals in the warrant, because such irregularities were not specified in his motion to vacate it (Rule 37; Code § 323). The order denying the motion to vacate the warrant must be affirmed, and so with the other intermediate orders appealed from.

No authority is cited for the proposition that the motion to compel delivery of property to the receiver cannot be made by the judgment creditor.

The order appealed from should be modified as heretofore directed, and as so modified, affirmed, without costs to either party. .

LARREMORE, Ch. J., and BISCHOFF, J., concurred.

Order accordingly.

JOHN J. HAMES *et al.*, Respondents, *against* JOHN R. JUDD,
Appellant.

(Decided April 7th, 1890.)

An action commenced in a district court and removed to the Court of Common Pleas is not an action "brought" in a court of record, within the meaning of section 3268 of the Code of Civil Procedure, allowing defendant to require security for costs from a non-resident plaintiff.

But while defendant cannot require security for costs, the court may require it, under section 889 of the Code, as a condition of allowing plaintiff a commission to take testimony abroad; and such a condition is reasonable where plaintiffs have delayed their application without apparent cause, and their recovery is doubtful.

APPEAL from part of an order of this court.

Hames v. Judd.

The action was originally brought in a district court by the plaintiffs, who were non-residents, to recover for goods sold and delivered, but was removed to this court. After the removal, defendants moved to require plaintiffs to file security for costs. On the hearing of the motion at Special Term, the following opinion was delivered.

J. F. DALY, J.—This application is made under the general provision of the Code, § 3268, relating to security for costs. It provides that defendant may require such security “in an action brought in a court of record,” and it is contended by this defendant that an action removed into this court is an action “brought” in this court. I cannot agree in such a construction of the statute. The word “brought,” in the section in question, signifies “begun” or “commenced.” The phrase “to bring an action” has a settled, customary, legal, as well as general, meaning, and refers to the initiation of legal proceedings in the suit. The fact that the word “commenced” is used in the section of the Code, as applied to the beginning of the action, does not conflict with this view, since the two expressions “brought” and “commenced” mean the same thing. The word “brought” has never been used as synonymous with “removed” in cases of removals of actions from one court to another. On the contrary, in the sections of the Code relating to such removal, the word “brought” is applied to the commencement of the action in the court from which it is removed (Code §§ 319, 343). The legislators evidently intended that a plaintiff who brought his action in a court not of record, where such court had jurisdiction, should not be required to give security for costs. The object of the legislation is plain enough; it is to encourage resort to the inferior courts in matters of which they have jurisdiction; and the defendant, by removing the cause into a court of record, cannot deprive the plaintiff of the immunity which he has gained by resorting in the first instance to the favored tribunal. The cases cited by the defendant, as to the status of an action after its removal to

HAMES v. JUDD.

this court, have no application, as this motion is made upon a special statutory provision.

Motion denied, with \$10 costs.

Plaintiffs afterwards moved for a commission to take testimony abroad, and the motion was granted, on terms that they should give security for defendant's costs of the action. From so much of the order as imposed on them, as terms, the giving of such security, plaintiffs appealed.

Smith & White, for appellants.

J. C. O'Conor, Jr., for respondent.

J. F. DALY, J.—Usually the granting of a commission is a matter of course, the discretion of the court being exercised with respect to staying proceedings; but the Code now expressly authorizes the court to impose terms (§ 889). In this case the plaintiffs (who are non-residents) are required to give security for defendant's costs of the action as a condition of allowing them a commission to take testimony abroad. The case having been originally brought in a district court and removed to this court, the defendant had no right to require security for costs (see Special Term decision in this case); but there can be no doubt of the power of the court to require such security, as terms upon the allowance of a commission, if the circumstances of the case are such that justice requires it—to quote the language of section 889.

In this case it appears that the plaintiffs have, without apparent cause, delayed their application for a commission; and it also appears that a recovery upon their present alleged cause of action may be doubtful. It seems, from the affidavit of Mr. Peabody, managing clerk for defendant's attorney, that in October, 1889, plaintiffs' attorneys asked his consent to an amendment of the complaint substituting another cause of action, upon which, as they stated, they thought they would be more likely to recover. If there seems a prospect of defendant's succeeding, and he is required by the issuance of

Hammond v. Eckhardt.

a commission to suffer delay, or to incur additional expense, and his judgment for costs could not be collected by execution, as plaintiffs are non-residents, it does not seem unreasonable to require security for such costs from plaintiff when he asks for the commission.

The order appealed from should be in all things affirmed, with \$10 costs and disbursements.

LARREMORE, Ch. J., concurred.

Order affirmed, with costs.

MILTON E. HAMMOND, Respondent, *against* MARTIN ECKHARDT *et al.*, Appellants.

(Decided April 7th, 1890.)

In an action to recover the rent of premises on an alleged holding over under a year's lease, which expired May 1st, 1889, there was evidence that all defendants' machinery was taken out of the premises before such date, and that April 30th and May 1st were legal holidays, and that, on May 2nd, by reason of a civic procession in the street, defendants were not able to cross it with their trucks, but that at such time there were only some broken boards on the premises. *Held*, that the question of a holding over should have been submitted to the jury, and that it was error to direct a verdict for plaintiff.

APPEAL from a judgment of the District Court in the City of New York for the Third Judicial District, entered upon a verdict directed by the court.

The facts are stated in the opinion.

A. R. Kling, for appellants.

G. R. Carrington, for respondent.

LARREMORE, Ch. J.—This was an action brought by the plaintiff to recover rent for the month of July, 1889, for premises Nos. 148 and 150 Bank Street in the City of New York. The evidence shows that the defendants entered the premises in the year 1888 under a written lease which expired

Hammond v. Eckhardt.

May 1st, 1889, at an annual rent of \$1,800. The plaintiff seeks to recover rent for the year commencing the 1st of May, 1889, on the ground that there was a holding over which made defendants liable for the rent since the 1st of May. The answer was a general denial. Upon the trial judgment was directed for the plaintiff for the July rent.

The main question in dispute was as to the surrender and acceptance of the premises. This question was one of fact and should have been submitted to the jury. It is shown by defendants' testimony that all machinery had been taken from the premises before the 1st of May, 1889, and that the 30th of April and the 1st of May were legal holidays, and that on the 2nd of May by reason of the civic procession they were unable to cross Broadway with their trucks, but that at that time there only remained some broken boards upon the premises in question. The following questions were put to the landlord: "Q. Did you not know that they moved out all the machinery they had in your building, in the month of April? A. No. Q. Did you not see them moving it out of your building in April? A. I think they did." The tenant after the termination of the lease had still the right to enter upon the premises within a reasonable time for the purpose of removing his goods and utensils, which he may do if he does not exclude the landlord. The judge admitted evidence to show that after the 1st of May the engineer of the building had a conversation with one of the defendants' employes in reference to furnishing steam, but it does not appear that such employe had authority to bind the defendants or that they ratified his action. Whether or not there was a holding over was clearly a question for the jury upon the evidence, and it was error to order judgment for the plaintiff.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

BISCHOFF, J., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

Harft v. Tonnelli.

CHARLES HARFT, Appellant, *against* WALTER TONNELLI
et al., Respondents.

(Decided April 7th, 1890.)

On the day defendant was to take possession of plaintiff's premises under a written lease for a term of years, plaintiff destroyed the lease and refused possession, but subsequently, on the same day, said he had changed his mind, and he let defendant into possession, saying he would prepare a new lease similar to the other. Several months thereafter he tendered a lease unlike the one destroyed, which defendant refused to sign, and no other lease was ever made. *Held*, that plaintiff, in an action under the latter lease, could not recover upon the lease destroyed for the rent of any part of the term after the premises were abandoned by defendant.

APPEAL from a judgment of the District Court in the City of New York for the Third Judicial District.

The facts are stated in the opinion.

Henry Wehle, for appellant.

J. M. Tonnelli, for respondents.

LARREMORE, Ch. J.—This action was brought to recover rent due for the month of November, 1888, for premises No. 18 Clinton Place in the City of New York, under an alleged verbal lease made May 1st, 1888, for the term of one year. Defendants denied that such lease was ever made, and also claimed a surrender of the premises by the defendants and acceptance by the plaintiff. These were the main issues litigated in the court below and were purely questions of fact upon the evidence offered.

It appears by the testimony that in November, 1887, the parties all executed a written lease whereby the plaintiff leased the premises in question to the defendants for two years and five months from December 1st, 1887; that at the time of the execution of the lease defendants tendered one month's rent, which plaintiff refused to accept because they

Harft v. Tonnelli.

did not tender at the same time the price of certain property. He told them to wait until December 1st. Upon that day the defendants called to pay the rent for December and also for the alleged property, when plaintiff took the lease from his desk and destroyed it, telling defendants he would not let them have the premises. Afterwards, on the same day, he told defendants he had changed his mind and would let them have the premises, and would prepare a new lease with the same conditions as the one destroyed, whereupon defendants paid one month's rent and went into possession. Some time thereafter the plaintiff presented a new lease unlike the one destroyed, which defendants refused to sign because not according to the agreement, and no second lease was ever executed nor any other lease ever made. It seems to be quite evident that defendants continued in possession of the premises with the expectation of receiving the same lease that they had previously signed for two years and five months which lease as above stated was destroyed. Plaintiff based his action upon the lease or agreement made May 1st, 1888, and cannot now claim to recover upon any other. He failed to prove such a contract by a preponderance of evidence. It is unnecessary to refer to the testimony, which is very voluminous, as it fully appears on the return. If the surrender and acceptance was duly made, and there is some testimony to that effect, the judgment rendered should not be disturbed on appeal, but should be affirmed, with costs.

BISCHOFF, J., concurred.

Judgment affirmed, with costs.

Healey v. Terry.

WARREN M. HEALEY *et al.*, Appellants, *against* KATE L. TERRY, Respondent.

(Decided April 7th, 1890.)

A witness called to impeach another testified that he had been in the same business as such other for 18 years, and had business dealings with him, and was then asked what such witness's reputation was for truth and veracity, and whether he would believe him under oath. His residence was not shown. *Held*, that it was not error to exclude the questions for want of a proper foundation.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered on the verdict of a jury.

This action was brought to recover for repairs to defendant's carriage. Defendant counterclaimed for damages for unskillful and negligent work in making such repairs, and the jury found a verdict for defendant for \$50. The judgment entered thereon was affirmed by the General Term of the City Court. From that judgment plaintiffs appealed to this court.

William H. Arnoux, for appellants.

Jacob Fromme, for respondent.

LARREMORE, Ch. J.—The only point urged on behalf of the appellants which we are called upon to consider is based upon the testimony of the witness Ten Eyck. His evidence was so short that it may be quoted entire: "Question. What is your business? Answer. Carriage furnishing. Q. How long have you been in that business? A. Eighteen years. Q. Do you know Mr. Burroughs? A. I do. Q. Had business dealings with him? A. I have. Q. What is Mr. Burroughs' reputation for truth and veracity? (Objected to. Objection sustained. Exception taken). Q. Would

Healey v. Terry.

you believe Mr. Burroughs under oath? (Objected to. Objection sustained. Exception)." The General Term of the City Court held that there was no error in excluding the above questions, because no proper foundation had been laid for their admission. The general American principles governing the impeachment of witnesses are well stated in a note to Chase's Edition of Stephens' Digest of the Law of Evidence, art. 133, p. 232, as follows: "It is a well-settled rule in this country that a witness of the adverse party may be impeached by evidence from other persons of his bad general reputation in his own community. The impeaching witnesses must come from this community, and in examining any one of them the form of inquiry usually is to ask (1) whether he knows the general reputation in that community of the witness in question: then, if he assents, (2) what that reputation is; and (3) whether from such knowledge he would believe such witness on his oath." It has been held that it is discretionary with a trial court whether the first of such questions, as to whether the impeaching witness knows the general reputation of the other, must be asked (*Wetherbee v. Norris*, 103 Mass. 565). If it be discretionary whether such preliminary inquiry shall be put, it must also be discretionary with the judge, when the same has not been asked, to exclude the subsequent questions touching a person's reputation for truth and veracity, and as to whether he is entitled to belief under oath. There is nothing to show that the trial judge did not exclude the evidence because, in the exercise of his discretion, he deemed the preliminary general inquiry essential. We will not presume error, necessitating a reversal, when a perfectly fair construction of the record discloses a theory upon which the judge may have acted with propriety, and within his province. The presumption that the judge's reason for excluding the evidence was that a proper foundation had not been laid is strengthened by analysis of what Ten Eyck actually had said. He averred that he had been in the carriage furnishing business for 18 years; that he knew Mr. Burroughs, and had had business dealings with him. These

Healey v. Terry.

facts might have been true, though the two men resided in different communities, widely remote from each other, and conducted their business transactions by correspondence. Nothing was drawn out which shows, even by implication, that Ten Eyck was acquainted with Burroughs' general moral character, or his reputation for truth and veracity. We will not presume, for the sake of reversing this judgment, in the absence of any suggestions to such effect in the case, that Ten Eyck resided and did business in New York (even the residence of this witness was not asked in his examination), and that, that if he had been allowed to testify as to Burroughs' reputation, he would have done so from competent and sufficient knowledge. Our conclusion is that, upon the record as it stood when the interrogatories were put to Ten Eyck, no error was committed in ruling them out.

The judgment must be affirmed, with costs.

BISCHOFF, J., concurred.

Judgment affirmed, with costs.

J. F. DALY, J.—In concurring with the Chief Justice that the judgment must be affirmed I wish to say that I can find no error in the exclusion of evidence (as claimed in appellants' first point) of custom in regard to the storage of defendant's carriage after repairs upon it by plaintiffs were completed. The record does not show any ruling adverse to appellants upon this point. The defendant's objection to the evidence was overruled. The appellants claim that this was a "typographical error," and that the ruling was actually the other way, and that an exception was taken by them. Nothing of the kind appears in the papers before us, and an examination of the case would seem to show that it is correct as it stands. There is an answer to the question which was objected to, and this could not be so if the objection to it had been sustained. It also appears that the plaintiffs did not rely upon custom for their charge of storage, but upon a special contract. Mr. Healey says "There must have been a

Hill v. London Assur. Corp.

special contract." He was also permitted to testify what plaintiffs' custom was:—that plaintiffs "always charge storage." But I think the whole contention may be disposed of by the fact that, according to plaintiffs, storage was only to be charged after the customer was notified that the repairs were completed; and that was not done in this case. A notice was sent the day after the carriage was received for repairs, but none after repairs were completed. No authority is cited by appellant for the proposition that, as defendant had paid a previous bill for repairs, she could not counterclaim damages for unskilful or negligent work in making such repairs; nor for the proposition that the payment of such bill by the defendant and the recovery of a judgment for a subsequent bill by plaintiffs, is conclusive as to all matters connected with the first bill, the same as if plaintiffs had recovered a judgment therefor; and there seems to be no foundation for either proposition.

The judgment should be affirmed.

Judgment affirmed, with costs.

STEPHEN HILL, Respondent, *against* THE LONDON ASSURANCE CORPORATION, Appellant.

(Decided April 7th, 1890.)

A policy insuring against fire property while contained in a certain dwelling, stipulated that no officer, agent, or other representative of the insurance company should have power to waive or be deemed or held to have waived the provisions and conditions of the policy unless such waiver should be written upon or attached to the policy. The insured delivered the policy to an agent of the company to procure its consent, required by the policy, to a removal of the insured property, and the agent returned it to him without indorsement or other writing of any kind, informing him that all proper formalities had been complied with, and that the policy would cover the property in its new location; and the insured thereafter removed the property. *Held*, that the insurance was forfeited.

A policy of insurance against fire expressly provided that, in case of loss, the insurance company might cause investigation and appraisal to be made

Hill v. London Assur. Corp.

without being deemed to have waived any forfeiture. *Held*, that, after a fire, a reference of the matter to an adjuster for investigation and appraisal did not waive a forfeiture.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered on the verdict of a jury and an order denying a motion for a new trial.

The action was brought upon a policy of insurance, against fire, of certain household furniture and other personal property of plaintiff "while contained in the frame dwelling situate, detached, at Bay Side, Long Island." The policy contained the following clause: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have proper power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The policy also provided that, in case of loss, the company might cause investigation and appraisal to be made without being deemed to have waived any forfeiture.

The testimony on behalf of plaintiff was to the effect that, on or about August 9th, 1887, plaintiff took the policy to the general agent of defendant, through whom it had been originally issued to him, and informed the agent that he was about to remove the insured property to another place, and requested the agent to procure the consent of defendant to such removal, or the waiver of any forfeiture that might be incurred thereby; that thereafter the agent returned the

Hill v. London Assur. Corp.

policy to plaintiff, and informed him that all proper formalities had been complied with and that the policy would still cover the property in the new location; and that during August and September, 1887, plaintiff removed the property to his new dwelling at Bay Side, Long Island, where it remained until January 31st, 1888, when it was destroyed by fire. No indorsement or other writing of any kind was ever made on or attached to the policy.

A motion by defendant to dismiss the complaint was denied, and the case submitted to the jury, which found a verdict for plaintiff. Defendant's motion for a new trial was also denied, and judgment for plaintiff was entered on the verdict. From the judgment and the order denying its motion for a new trial, defendant appealed to the General Term of the City Court, which affirmed the judgment and order. From that decision defendant appealed to this court.

J. Notman, for appellant.

C. A. Clement, for respondent.

LARREMORE, Ch. J.—It is immaterial what our own views might have been upon the main question, if it had arisen here for the first time, because we think we must decide it on clear and unmistakable authority. We can discover no distinction in principle between the case at bar and *Walsh v. Insurance Co.* (73 N. Y. 5). In that case it was expressly provided in the policy that no officer, agent, or representative of the company should be held to have waived any of the terms and conditions of the policy unless such waiver was indorsed thereon in writing. The Court of Appeals held that this was a plain limitation upon the power of agents, and could mean “nothing less than that agents shall not have the power to waive conditions except in one mode, viz., by an indorsement on the policy.” The provision on that subject in the policy before us is, if anything, more explicit in its terms than the one under consideration in *Walsh v. Insurance Co.*, and all the reasons therein given for holding the plaintiff bound by such

Hill v. London Assur. Corp.

condition apply here. The fact has not been overlooked that several later cases in the Court of Appeals have been distinguished from *Walsh v. Insurance Co.*, *supra*; but the reason for such distinction was that in such later cases the power and authority of the agent were not specially defined and limited, as they are in the case at bar. The ground taken is that as the company itself could dispense with a condition by oral consent as well as by writing, the general agent could do the same unless specially restricted. *Steen v. Insurance Co.* (89 N. Y. 316). But obviously the reason for such distinction does not exist in the case before us. The agent's authority is restricted, if anything, more closely than in *Walsh v. Insurance Co.*, and we regard this case as controlling.

We think the learned trial judge also erred in holding under this particular policy that a waiver could be inferred by the reference of the matter after the fire to the adjuster for investigation and appraisal. It is well settled that if, after knowledge of any alleged forfeiture, the company "recognizes the continued validity of the policy, or does acts based thereon, or requires the insured, by virtue thereof, to do some act or incur some trouble or expense, the forfeiture is, as matter of law, waived." *Titus v. Insurance Co.* (81 N. Y. 410). But this doctrine of implied waiver cannot be invoked where, as in the policy under consideration here, there is an express provision that the company may cause investigation and appraisal to be made without being deemed to have waived any forfeiture. Defendant's motion to dismiss the complaint should have been granted, and the judgment should be reversed and a new trial ordered, with costs to abide the event.

J. F. DALY and BISCHOFF, JJ., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

Holland v. Mayor &c. of New York.

ALICE HOLLAND, Appellant, *against* THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

(Decided April 7th, 1890.)

Plaintiff was injured by falling off a gang plank into an open stairway in landing from a boat on defendant city's dock. The maintenance of the stairway was necessary for landing passengers, and the dock was not defective or in a dangerous condition. In an action to recover for the injury there was no proof that the boat or gang plank was owned or furnished by defendant or operated by its servants. *Held*, that the complaint was properly dismissed.

APPEAL from a judgment of this court entered on the dismissal of a complaint at the trial.

The facts are stated in the opinion.

Samuel H. Randall, for appellant.

Sidney J. Cowan, for respondent.

BISCHOFF, J.—Action to recover for personal injuries alleged to have been sustained through the negligence of defendant's servants.

On December 12th, 1887, about 9:30 p. m., the plaintiff, returning from a visit to the House of Refuge on Randall's Island in the East River, was conveyed by boat from thence to the defendant's dock at the foot of East 120th Street in the City of New York. The transfer of passengers from the boat to the dock was effected by means of an adjustable gang plank of about two and one-half feet in width resting at one end upon the boat, and at the other on an open stairway in the end of the dock, the stairway being about eight feet wide by six feet in depth. In attempting to reach the dock by means of the gang plank, the plaintiff stepped off the plank to the side thereof, and, falling into the stairway opening left uncovered by the gang plank, sustained

Holland v. Mayor &c. of New York.

severe injuries. On the trial the dock was shown to be public, owned and controlled by defendant, and that the open stairway therein had been constructed by the managers of the House of Refuge with the permission of the defendant, to facilitate the landing of passengers; that the gang plank used in the transfer of passengers, and by means of which plaintiff attempted to reach the dock, was not provided with guards, and that in the use of the gang plank in the manner described a portion of the stairway was necessarily left uncovered. It was also shown that the dock was not sufficiently lighted near the open stairway. There was, however, no proof that the boat or gang plank was the property of the defendant or that either was managed or operated by the defendant's servants. It did not appear that the dock was in need of repair or that its construction was defective or its condition dangerous. The open stairway was necessary in the landing of passengers, and its maintenance was not a nuisance. The plaintiff was not injured while on the dock, but in an attempt to reach it, and the means furnished her for access to the dock were not shown to have been furnished by defendant, in or any way under the control or management of its servants. There is nothing in the proof adduced on behalf of the plaintiff from which the law could imply a duty on the part of the defendant to furnish the plaintiff with safe and proper means of access to the dock from the boat which conveyed her thither.

There is then an utter absence of proof of any fact upon which the negligence of the defendant's servants at the time of the accident to the plaintiff could be predicated, and no error was committed by the trial judge in directing a dismissal of the complaint.

J. F. DALY, J., concurred.

Judgment affirmed, with costs.

James v. Ford.

THOMAS W. JAMES, Respondent, *against* JAMES FORD, Appellant.

(Decided April 7th, 1890.)

In an action for personal injuries it appeared that plaintiff entered defendant's liquor store by the front entrance to make a purchase, and, attempting to depart by a side door which he had often used as a means of exit, fell into a cellar opening in front of such door, which was in use and uncovered, and was injured. Plaintiff testified that the door was unlocked, and that there was insufficient light to see the opening, while defendant offered evidence that the door was locked and bolted, and plaintiff was warned against its use, which plaintiff denied. *Held*, that the questions of negligence and contributory negligence were properly submitted to the jury.

The complaint alleged ownership of the premises by defendant, while the answer admitted that he occupied the premises and carried on business there. *Held*, that the failure to prove ownership was not a material variance.

In an action for personal injuries caused by defendant's negligence, a person not an expert may testify as to the extent of plaintiff's injury immediately after the accident, where it involves only a description of his appearance.

APPEAL from a judgment of the General Term of the City Court of New York, affirming a judgment of that court entered on the verdict of a jury and an order denying a motion for a new trial.

H. A. Brann, for appellant.

Otto Horwitz, for respondent.

BISCHOFF, J.—Defendant was the lessee and occupant of the store situated on the northeast corner of Eighth Avenue and Fortieth Street, in the City of New York, where he was engaged in the retail liquor business. The store was provided with two doors for the entrance and departure of customers, one at the corner, and the other on Fortieth Street, some distance from the corner. Outside of the store and directly in front of the side entrance there was an opening leading from the street to the cellar under the store, which, when not in

James v. Ford.

use, was kept covered. On the night of October 9th, 1886, the plaintiff, having entered the store by means of the corner door to make a purchase, attempted to depart therefrom through the side door, and fell into the cellar opening which was then being used and left uncovered, and sustained the injuries alleged.

Plaintiff admitted that he was aware of the existence of the cellar opening, that he had frequently entered and departed from the store by means of the side door, walking over the opening which on such occasions had been covered, but testified that he did not know at the time of the accident that the opening was in use or uncovered, that there was insufficient light to enable him to see the opening, and that he was not warned or cautioned against the use of the side door as an exit from the store.

Defendant claimed, and on the trial supported his claim by the testimony of witnesses, that at the time of the accident the side door was locked or bolted, and departure from the store by means of that door thereby sought to be prevented; that plaintiff was warned against leaving by the side door, but that warning was unheeded; and that to enable him to pass through the side entrance into the street the plaintiff was compelled to unlock or unbolt the door.

On this evidence the court below submitted the questions of defendant's negligence and plaintiff's contributory negligence to the jury, who found a verdict for the plaintiff in the sum of five hundred dollars.

No tenable ground is urged by defendant for reversal of the judgment of the lower court. Defendant was engaged in business at the premises where the accident to the plaintiff occurred, exposing his goods for sale to persons wishing to buy, and thereby extended a general invitation to all such persons to enter his store for that purpose. He thereby represented the premises, and the means of entrance and departure provided for the use of customers, to be safe and free from all risk of injury. It thus became defendant's duty to exercise reasonable care in maintaining the premises and the

James v. Ford.

means of entrance and departure at all times in such condition that others visiting his store upon business might enter and depart with safety to themselves, and for an injury arising from a breach of that duty the defendant is answerable in damages. Customers entering the premises were therefore justified in assuming that the ostensible means of entrance and departure were reasonably safe, and were under no obligation, before entering or departing, first to ascertain by careful inspection whether or not it was safe for them to do so (*Dunn v. Durant*, 9 Daly 389; *Ackert v. Lansing*, 59 N. Y. 646; *Swords v. Edgar*, 59 N. Y. 28; *Leary v. Woodruff*, 4 Hun 99, 76 N. Y. 617; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124).

It is unquestionably true that before plaintiff can recover he must appear to be free from all negligence on his part which in any measure contributed towards the happening of the accident resulting in his injuries, and that there must be affirmative evidence of defendant's negligence which led to the accident. It is not necessary, however, that there should be direct evidence of the absence of contributory negligence on the plaintiff's part. The absence of such contributory negligence may be inferred from circumstances (*Warner v. New York Central R. Co.*, 44 N. Y. 465; *Wendell v. New York Central & H. R. R. Co.*, 91 N. Y. 420; *Hackeford v. New York R. R. Co.*, 53 N. Y. 654).

When plaintiff rested his case it fully appeared that defendant occupied the premises for the purposes of his business, that plaintiff entered the same intending to make a purchase, that he attempted to depart by means of the side door, which was unlocked at the time, and which he had frequently used as a means of exit, and, stepping outward towards the street, fell into the cellar opening and sustained the injuries for which he asks to be indemnified. These facts, in conjunction with defendant's duty to maintain the premises and the means of access thereto and departure therefrom free from all risk of injury, together with plaintiff's right to assume that this duty had been complied with, established a *prima*

James v. Ford.

facie case, and, in the absence of evidence tending to disprove plaintiff's allegations, he was entitled to recover. The motion to dismiss the complaint at this stage of the proceedings was therefore properly denied. Again, when the evidence for both sides was submitted, the foregoing facts still appeared, met however by testimony for the defense that the side door was locked or bolted and departure by that means cut off, but that plaintiff, heedless of warnings against the use of the side door, unlocked or unbolted it, and, stepping outside, fell into the opening and was injured. These facts introduced for the defense were in turn met by the denials of the plaintiff, and there had then arisen such a conflict of evidence as to entitle the plaintiff to have the questions of defendant's negligence and his own contributory negligence submitted to the jury. A refusal to submit those questions to the jury would therefore have been error, and for the reasons above stated the refusal of the court to set the verdict aside as against the evidence, or as unsupported by the evidence, must be sustained.

The failure to prove the ownership of the premises by the defendant did not constitute such a variance of proof as could have misled the plaintiff. The complaint alleged that defendant was the owner, while the answer admitted that he occupied the premises and carried on his business therein. These facts supported by evidence of the circumstances attending the accident substantially established the plaintiff's cause of action alleged in the complaint (*Dunn v. Durant*, 9 Daly 389.)

The admission, against defendant's objection, of the testimony of plaintiff's wife concerning the extent of her husband's injuries, was not error. The witness was not called upon to testify as an expert, or concerning her belief or thoughts, or the operation of her mind, but to state the visible indications of plaintiff's injuries immediately after the accident, and her testimony did not go beyond this. There is no good reason for excluding evidence of the injured person's appearance immediately after the accident, and the testimony of any intel-

Jordan v. New York & H. R. Co.

ligent witness, having knowledge of such appearance, is competent for that purpose.

Plaintiff was allowed to testify, under objection, concerning the reason why he was not positive who was with him on returning home after the accident. The objection was as to the materiality of the evidence, but it appears that the testimony was elicited to explain plaintiff's statement on cross-examination that he could not identify the person accompanying him home, and in that connection it cannot be said to have been immaterial, and the objection to its materiality conceded the competency of the evidence (*Ward v. Kilpatrick*, 85 N. Y. 413).

The other exceptions on defendant's behalf to the admission and exclusion of evidence are equally without sufficient merit to warrant a reversal.

The order of the General Term of the City Court affirming the judgment of the court below should be affirmed, with costs.

LARREMORE, Ch. J., and J. F. DALY, J., concurred.

Judgment affirmed, with costs.

HENRY JORDAN, Respondent, *against* THE NEW YORK & HARLEM RAILROAD COMPANY, Appellant.

(Decided April 7th, 1890.)

In an action for personal injuries to plaintiff, shown to have been of the most serious character, entailing confinement to the house and to his bed for a long period, great suffering of body and anxiety of mind, expensive surgical treatment, besides ordinary attendance of physicians, and the amputation of a large portion of one of his feet, the jury found a verdict for plaintiff for \$11,000. *Held*, that the judgment thereon should not be reversed, simply because plaintiff was advanced in years.

APPEAL from a judgment of this court entered on the verdict of a jury and from an order denying a motion for a new trial.

Jordan v. New York & H. R. Co.

The action was brought for personal injuries to plaintiff, alleged to have been caused by the negligence of the driver of one of defendant's horse cars, on which plaintiff was a passenger, who, after stopping it to allow plaintiff to alight from the front platform, started it again while plaintiff was in the act of stepping down, whereby he was thrown under the car and run over by the wheels. At the trial, the jury found a verdict for plaintiff for \$11,000. A motion by defendant for a new trial was denied, and judgment was entered on the verdict. From the judgment and the order denying its motion for a new trial, defendant appealed.

Henry H. Anderson, for appellant.

Hugh L. Cole, for respondent.

LARREMORE, Ch. J.—Upon the main facts alleged and proved there is very little to be said. Plaintiff offered abundant proof from which the jury might infer negligence on the part of the defendant's servant, and absence of contributory negligence. The learned judge correctly ruled on all questions submitted to him, and properly presented the case to the jury for their determination. The only possible question that could arise for consideration is that of the amount of the damages awarded. The learned counsel for appellant claims that these are excessive. I have carefully considered the facts of the case, and the authorities which he cites, and have reached the conclusion that the verdict of the jury should not be disturbed. The evidence shows that the plaintiff, though a man of advanced years, was engaged in business at the time of the accident, and that he has since been unable to attend to any business. He testified that he told the driver to stop the car before alighting, and it appears that said car was at a standstill before he attempted to step down. While he was in the act of descending, the driver started the car; and he was thrown down, and run over by the wheels. The injuries he suffered were of the most serious character, entailing confinement to the house and to his bed for a long period, great

Krahner v. Hellman.

suffering of body and anxiety of mind, expensive surgical treatment, besides ordinary attendance of physicians, and the amputation of a large portion of one of his feet. The learned counsel for respondent, in his brief, has cited many cases where verdicts for a much larger amount than the present one, of \$11,000, were sustained on appeal for injuries not as serious in character as those upon the trial of this action. If the plaintiff had been a young man, or a man in the prime of life, we hardly think it would be seriously claimed that such sum was excessive, under such circumstances. We do not feel called upon to reduce this amount simply because the claimant is advanced in years. Presumably, this factor was taken into consideration by the jury in awarding the amount. This is a question peculiarly within their province; and there is nothing in the evidence to make it seem probable that they were influenced by passion or prejudice, or any other improper motive. The judgment appealed from should be affirmed, with costs.

J. F. DALY and BISCHOFF, J J., concurred.

Judgment affirmed, with costs.

JACOB KRAHNER, Respondent, *against* JOHN HEILMAN,
Appellant.

(Decided April 7th, 1890.)

In an action in a district court an adjournment was taken in order to allow defendant to produce his sureties to justify on an undertaking offered for a removal of the cause, but he failed to appear on the adjourned day, and his default was taken. Subsequently the default was vacated and defendant permitted to defend on depositing the amount of plaintiff's claim and costs with the court and signing a stipulation to that effect, and the case was thereafter adjourned several times. *Held*, that defendant by his stipulation and the subsequent proceedings waived his right to a removal.

In an action to recover broker's commissions for procuring a purchaser for real estate, affirmative proof of the pecuniary responsibility of the proposed purchaser is not necessary to entitle plaintiff to recover, where defendant accepted such purchaser.

Krahner v. Hellman.

APPEAL from a judgment of the District Court in the City of New York for the Fifth Judicial District.

The facts are stated in the opinion.

E. B. Amend, for appellant.

Jacob Levy, for respondent.

J. F. DALY, J.—The first question raised by the appeal is whether the undertaking filed by defendant and the proceedings thereon required the removal of this cause to this court for trial. The defendant upon the return day of the summons offered an undertaking which was rejected, but leave to file another undertaking was granted and an adjournment had for the production of sureties to justify. The undertaking was filed, but upon the adjourned day defendant did not appear with the sureties, his default was taken, and judgment rendered in plaintiff's favor. This judgment was subsequently vacated and the default opened and the defendant permitted to come in and defend, upon the deposit by him of the amount of plaintiff's demand, with costs and interest, with the clerk of the district court. A stipulation to that effect was signed and an order entered thereon. The trial of the cause was adjourned thereafter from time to time; when it finally came on for trial defendant produced the sureties upon his undertaking and required the justice to make an order removing the cause. This was refused.

The defendant undoubtedly waived his right to remove the cause, by his stipulation and subsequent proceedings, all which were inconsistent with the position he afterwards assumed that the proceeding to remove was still pending. His acceptance of a stipulation to come in and defend upon the merits, after his default, would have been a waiver. If the stipulation had gone no farther than to open the default in failing to produce his sureties for justification, he would have been restored to his rights as they existed at the instant of the default, and such rights were to have his sureties jus-

Krahner v. Hellman.

tify and his undertaking approved. Until the undertaking was disposed of, the justice could do nothing; but the defendant could waive the duty imposed upon the justice by the filing of the undertaking, and could give him power to proceed with the cause (*Hogan v. Devlin*, 2 Daly 184). A stipulation to come in and defend upon the merits was an abandonment of the proceeding to remove; so was the payment into the district court of the amount of the claim, costs, and interest, under the stipulation requiring it, for this was tantamount to a submission of the controversy to that court, or to an expression of an intention to try it there; so likewise was the adjournment of the trial of the cause from time to time. There was a clear waiver of the right to remove, and the justice had power to try the cause.

We cannot disturb the judgment upon the facts or the law. The plaintiff's case was clearly proved. His assignors, Krakower & Robinson, real estate brokers, were authorized, according to the testimony of Krakower, to sell the defendant's house and lot in Norfolk Street for \$26,000, and having found a person who expressed her willingness to take it at that price, introduced her to defendant, who accepted her as a purchaser, but afterwards declined to execute a contract with her. No proof of the pecuniary responsibility of the proposed purchaser was offered, but the legal presumption is that she was solvent and able to perform the contract she was willing to make. Besides, the defendant said he was satisfied to sell to her. The meeting of the minds of the parties was thus proved. The defendant, his wife, his son, and another witness contradicted the testimony of plaintiff's assignor Krakower (the sole witness on plaintiff's behalf), but there were circumstances that the justice had a right to consider in weighing their testimony, and his finding in favor of plaintiff's solitary witness cannot be disturbed.

LARREMORE, Ch. J., and BISCHOFF, J., concurred.

Judgment affirmed, with costs.

Lathers v. Hunt.

RICHARD LATHERS, Appellant, *against* JACOB H. HUNT,
Respondent.

(Decided April 7th, 1890.)

Defendant, being indebted to plaintiff for rent, executed to him a chattel mortgage of his household goods on the demised premises. Defendant subsequently abandoned the premises and the goods, and plaintiff took possession thereof. *Held*, that his taking possession and caring for the goods did not constitute a conversion thereof, or an appropriation of them in satisfaction of the mortgage debt.

APPEAL from a judgment of the District Court in the City of New York for the Eleventh Judicial District.

The facts are stated in the opinion.

Joseph Walmsley, for appellant.

L. B. Bunnell, for respondent.

BISCHOFF, J.—Defendant, being indebted to plaintiff in the sum of one hundred and fifty dollars for rent of a flat at 179 East 93rd Street in the City of New York, and intending to secure the payment thereof, executed and delivered to the plaintiff a mortgage upon certain household furniture and carpets contained in the premises. The mortgaged chattels having been abandoned by defendant, plaintiff assumed possession thereof, and while still in such possession brought this action to recover from the defendant the amount of arrears of rent to secure the payment of which the mortgage was given. Upon the trial the defendant contended that the possession of the mortgaged chattels by the mortgagee operated as a satisfaction of the mortgage debt, and the trial justice, sustaining defendant's contention, rendered judgment in his favor.

At common law possession of the mortgaged chattels by the mortgagee was essential to the validity of the mortgage.

Lathers v. Hunt.

This is still the law of this state in the case of mortgages not filed as prescribed by statute, such filing being allowed only as a substitute for possession by the mortgagee, and there is nothing in the statute which prevents the mortgagee from filing his mortgage and having possession of the mortgaged chattels as well. See Laws 1833 c. 279 (3 Rev. St. Banks Bros. 7th ed. p. 2249,) § 1.

So, also, at common law, which remains unchanged, the mortgagee of chattels could proceed in three distinct methods to recover the mortgage debt. He could bring an action at law for the amount, and sell the mortgaged chattels under judgment obtained therein, or he could bring an action to foreclose the mortgage, or sell the chattels under a power of sale expressly conferred by the terms of the mortgage (Herman on Chattel Mortgages, p. 484, §§ 206, 207; Freeman on Chattel Mortgages, p. 488; *Elder v. Rouse*, 15 Wend. 218; *Sterling v. Rogers*, 25 Wend. 658).

“A mortgagee does not lose his right to the mortgaged property by obtaining judgment on the mortgage note and then seizing it on execution. The property is pledged as security for the debt, and is not taken in liquidation of it, and a judgment, while it may be a merger of the note so that no other action can be maintained on it, will not extinguish the security; that remains as security for the debt, no matter what form it takes, until the debt itself is extinguished.” (Herman on Chattel Mortgages, p. 487, § 207).

And the principles governing the relative rights and obligations of mortgagor and mortgagee in this respect are not distinguishable from those governing the rights of pledgor and pledgee, and the latter can maintain an action on the debt without offering to return the collateral (*James v. Hamilton*, 63 N. Y. 616).

Defendant having conceded his indebtedness to the plaintiff in the amount claimed, it follows from the foregoing that plaintiff should have had judgment.

LARREMORE, Ch. J., concurred.

Levy v. Coogan.

J. F. DALY, J.—It is undoubtedly true that a conversion by the mortgagee of mortgaged property entitles the mortgagor to a credit upon the debt to the extent of the value of the property so converted (*Small v. Herkimer Manuf. Co.*, 2 N. Y. 339). But there is no proof of conversion in this case. If the allegations of the answer be taken as averments of conversion, still no evidence was offered that sustains them. There was no conversion of the furniture when the tenant moved out, leaving it in the flat and in the possession of Mrs. Bryan to whom he gave express permission to use it while she occupied the premises. After she moved away, in July, 1888, the plaintiff took possession of it and placed it in other flats, sending the carpets to be cleaned. He had a right to possession, and his act in taking possession did not satisfy the debt, as Judge BISCHOFF has pointed out. There is no proof that the furniture was subsequently let with any other apartment, or used by the plaintiff, or by any person with his consent.

I concur that the judgment should be reversed, with costs, and a new trial ordered.

Judgment reversed, with costs, and new trial ordered.

LOUIS LEVY, Respondent, *against* THERESA COOGAN, Appellant.

(Decided April 7th, 1890.)

It is not essential, to entitle a real estate broker to commissions, that he should have procured a purchaser upon the precise terms named by the principal at the time of employment. If, through the instrumentality of the broker, the buyer and seller meet and negotiations are thus opened up between them, which, continuing without withdrawal of either party therefrom, culminate in a sale, though for a less sum than originally demanded and upon terms deviating from those at first fixed by the principal, the broker is entitled to his commissions.

In an action by a real estate broker to recover commissions, the deed from defendant, containing an admission of the receipt of a certain sum as the

Levy v. Coogan.

purchase price, is competent evidence by plaintiff to prove the fact of sale, and the sum at which made and the amount of plaintiff's commissions. The consideration named in the contract of sale between defendant and the purchaser is not conclusive upon plaintiff.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered on the verdict of a jury.

Martin J. Early, for appellant.

Alfred Steckler, for respondent.

BISCHOFF, J.—The judgment appealed from was rendered upon the verdict of a jury, but the case on appeal contains no order denying defendant's motion for a new trial, and an inspection of the notice of appeal does not disclose an appeal from such an order. This court is therefore precluded from reviewing the facts, excepting so far as may be necessary to ascertain if there was sufficient evidence to sustain the verdict (Code Civ. Pro. §§ 1346 and 1347, made applicable to appeals from the City Court to this court by §§ 1344, 3191, and 3192; *Wright v. Hunter*, 46 N. Y. 409; *Roos v. World Mut. Life Ins. Co.*, 4 Hun 133 and 64 N. Y. 236; *Godfrey v. Moser*, 66 N. Y. 250, 252; *Ehrman v. Rothchild*, 23 Hun 273).

It was admitted by the pleadings that plaintiff was engaged in business in the city of New York as a real estate broker; that he was employed by defendant to procure a purchaser for the premises Nos. 86, 88, and 90 James Street; and that the usual commissions of brokers for similar services were one per centum of the purchase money. The only issue to be tried was as to the performance by the plaintiff of the services required of him, and in support of plaintiff's claim of performance he testified that Matthew Coogan (who was conceded to have been defendant's authorized agent for that purpose) directed him to procure a purchaser in the sum of ninety-three thousand dollars for the three houses; that he (plaintiff) called the attention of Solomon Kushewsky and Raphael

Levy v. Coogan.

Kushewsky to the premises and introduced them to defendant's agent as persons wishing to buy; that defendant's agent negotiated with the Kushewskys concerning the amount of purchase money required, and finally consented to accept ninety thousand dollars for the entire premises, and that thereupon Solomon Kuskewsky purchased No. 86 for thirty thousand dollars, the commissions on which were paid to the plaintiff. It also appeared in evidence that by mutual understanding the sale of Nos. 88 and 90 was postponed until the return of Raphael Kushewsky from Troy, and that about a month later the last mentioned houses were conveyed to Raphael Kushewsky for sixty thousand dollars, that being the consideration named in the deed admitted in evidence. I fail to see any sufficient ground for holding that these facts did not establish plaintiff as the procuring cause of the sale, or that he did not fully comply with every requisite to his right of recovery of the commissions claimed. It is true that the evidence for defendant tended to establish facts inconsistent with those claimed for the plaintiff, but it was the province of the jury to accept the one and reject the other, and they having by their verdict pronounced in favor of the plaintiff, the evidence introduced on his behalf established the facts claimed for him, and these entitle him to the judgment rendered.

The trial justice's charge to the jury was most lucid and exhaustive. It was fully supported by the evidence and correctly stated the law applicable to the facts. The deed from defendant to Raphael Kushewsky, containing an admission by defendant of the receipt of sixty thousand dollars purchase money, was competent evidence to prove the fact of the sale, the sum for which the sale was made, and the amount of commissions to which plaintiff was entitled, and the court properly instructed the jury that this evidence might be considered by them in their determination of these questions. The consideration named in the contract of sale between Raphael Kushewsky and defendant was not conclusive upon the plaintiff.

Levy v. Coogan.

Defendant's counsel requested the court to instruct the jury that plaintiff was not entitled to a recovery unless it satisfactorily appeared that he had effected a sale at the sum and upon the terms fixed by defendant at the inception of plaintiff's employment, and that, though the sale was made to the person procured by plaintiff, if it was made for less than he was originally requested to obtain or upon terms essentially differing from those originally fixed by defendant, he was not entitled to the commissions. The legal propositions involved in these requests, while not absolutely incorrect, were not sufficiently broad to make them applicable to the facts, and were therefore justly denied. The justice charged that to entitle plaintiff to recover he must establish to the satisfaction of the jury "that the sale was at the price at which he was authorized to sell, or a price satisfactory to his principal under the employment which he claims was made;" and this amply stated the legal principles affecting plaintiff's right to recover. It is not essential, to entitle a broker to his commissions, that he should have procured a purchaser upon the precise terms named by the principal at the time of the employment. If, through the instrumentality of the broker, the buyer and seller meet and negotiations are thus opened between them, which, continuing without withdrawal by either party therefrom, culminate in a sale, though for a sum less than that originally demanded and upon terms deviating from those at first fixed by the principal, I can see no equitable ground in support of the claim that the broker has not been the procuring cause of the sale, and has not for that reason earned the commissions. The principal possesses an undoubted right to adhere to the price and terms originally fixed, but if he deviates therefrom and consents to a modification thereof, and thereupon concludes a sale with the person procured by the broker, he ratifies the latter's departure from his instructions and is liable for the commissions. While I have not been able to find any reported case in which this question appears to have been adjudicated by any court of this state, I know of no legal principle in conflict with the above

Levy v. Coogan.

view, and they are fully supported by the decisions in *Dexter v. Campbell* (137 Mass. 198) and *Potvin v. Curran* (13 Neb. 302); the first being a case for commissions on the sale of stock, the second of real estate, but the governing principles being alike in both cases. Neither are these views in conflict with the decision in *Sibbald v. Bethlehem Iron Co.* (83 N. Y. 378), cited by defendant's counsel, and *Briggs v. Rowe* (1 Abb. Ct. App. Dec. 189).

The two cases last cited hold only that although the broker may have been the means of first bringing the parties together and of opening negotiations between them, yet if the negotiations are unproductive and the parties in good faith withdraw therefrom and abandon the proposed purchase and sale, a subsequent renewal of negotiations or sale upon the same or different terms does not entitle the broker to the commissions, and that he cannot in such a case be said to have been the procuring cause of the sale, a proposition to which I unqualifiedly assent.

The exceptions taken by defendant during the progress of the trial were not specially urged upon this appeal, but an examination thereof does not reveal any error which would entitle defendant to a reversal.

The judgment of the General Term of the City Court affirming the judgment of that court should be affirmed, with costs.

LARREMORE, Ch. J., and J. F. DALY, J., concurred.

Judgment affirmed, with costs.

Mattern v. Sage.

SOPHIA L. MATTERN, Appellant, *against* RUSSELL SAGE,
Respondent.

(Decided April 7th, 1890.)

A broker holding stock as partial security for a debt, with the right to sell it at any time to protect himself, is not legally obligated to sell and realize upon it before bringing action or counterclaiming upon the debt, where the debtor has not directed a sale.

APPEAL from a judgment of this court entered upon the report of a referee.

The facts are stated in the opinion.

Ira Shafer, for appellant.

Henry S. Bennett, for respondent.

LARREMORE, Ch. J.—The main controversy in this action was on the facts. There was a direct conflict of evidence between the parties upon all the material facts, but, as defendant was corroborated in so many important points by plaintiff's own letters, we do not see how the learned referee could have reached any other conclusions than those embodied in his report.

The defendant was not legally obligated to sell and realize upon the stock he holds as partial security for the debt, before counterclaiming and demanding judgment for the whole amount. Defendant claims, and the referee has found, that defendant has been holding this stock for plaintiff's account for several years, and plaintiff has never directed a sale thereof. Because a broker has the right to sell stock out at any time to protect himself, it does not follow that he is obliged to follow this course if he chooses to take the risk of his principal's eventually making good any loss that may occur (See *First National Bank v. Wood*, 71 N. Y. 409). In the case at bar it appears that the stock has been held for such a

Moench v. Yung.

long period with full knowledge and by mutual arrangement of the parties, presumably in the expectation of a rise. It is therefore equitable, as well as legally justifiable, that when the broker is sued by his principal on account of this and other transactions, he should be allowed to counterclaim whatever indebtedness exists at the time, without, in default of a direct order, being obliged to depart from the former arrangement.

The judgment appealed from should be affirmed, with costs.

BISCHOFF, J., concurred.

Judgment affirmed, with costs.

JOHN MOENCH, Respondent, *against* MARY YUNG, Appellant.

(Decided April 7th, 1890.)

The Court of Common Pleas, on reversing the final order of a district court in summary proceedings, has power, under sections 2260 and 3213 of the Code of Civil Procedure, to order a new trial.

APPEAL from final order of a district court in the city of New York in summary proceedings for recovery of possession of real property.

Upon trial by jury in the district court, a verdict was rendered for plaintiff. From the final order in favor of plaintiff entered thereon, defendant appealed to this court. On the hearing of the appeal, the order was reversed and a new trial ordered. Subsequently, a reargument was ordered on the question whether, upon reversing the final order of the justice, this court had power to order a new trial.

F. J. Bischoff, for appellant.

C. H. Preyer, for respondent.

Moench v. Yung.

J. F. DALY, J.—The section of the Code relating to appeals from final orders in summary proceedings provides that: “An appeal may be taken from a final order, made as prescribed in this title, to the same court, within the same time, and in the same manner, as where an appeal is taken from a judgment rendered in the court of which the judge or justice is the presiding officer, and with like effect. . . .” (Code § 2260). Turning to the section of the Code which regulates appeals from judgments rendered in the district courts, it is found that this court has power to reverse, affirm, or modify the judgment appealed from, and, where a judgment is reversed, to order a new trial (Code § 3213). These sections read together seem to give us the power to order a new trial in the summary proceeding. Appeals in such proceedings are taken with the “like effect” as appeals from judgments. With like effect means with like result: and this includes any disposition, in the one case, which the appellate court could make in the other. In the case of *Clark v. Carroll* (1 Civ. Pro. Rep. 298, *note*), I held that the provisions of the Code that an appeal from the district courts should be taken “in the manner” prescribed for appeals from justices of the peace, authorized the same disposition of the former appeal which could be made of the latter: that the “manner of taking” includes the manner of disposing, when there is no other provision as to how the appeal shall be heard and determined or as to the award of costs therein (See sections 3213, 3060, and 3067 as they existed in May, 1881, the date of the decision).

It is contended, however, by the appellant that sections 2260 and 3213 should not be read together, for the reason that section 3213 was amended in 1883 by the addition of the clause giving power to order new trials; that prior to that date this court could only reverse, modify, or affirm the judgments of the district courts; and such effect and no other was intended by the legislature in enacting in 1879 section 2260, assimilating the practice on appeals from final orders in summary proceedings to appeals from judgments. This con-

Mooney v. New York El. R. Co.

tention is, however, directly opposed to the well settled rule of interpretation that "all acts on the same subject whenever passed are what is termed *in pari materia*, are to be construed as if constituting one act, and are to be so interpreted that all of them and all their claims may be operative" (1 Edm. Stat. xviii).

It is also suggested that, as the Code (§ 2263) provides for restitution in case of reversal in summary proceedings, this excludes the power to make any other disposition if the order be reversed. If this section contained an enactment respecting the powers of the appellate court over the appeal, we should probably be compelled to hold it to be exclusive and to negative the claim of any power not expressly conferred; but the section evidently refers to the power of ordering restitution only—a power which is merely collateral to the disposition of the appeal.

A new trial was ordered in this case, and that decision should not be disturbed. As to the application for restitution, I think it should be denied (under the circumstances of the case) with leave to renew in case the landlord fails to proceed with diligence in procuring the new trial to be had. There should be no costs of this reargument, as the question is a new one.

LARREMORE, Ch. J., concurred.

Order accordingly.

JAMES MOONEY, Respondent, *against* THE NEW YORK
ELEVATED RAILROAD COMPANY *et al.*, Appellants.

(Decided April 7th, 1890.)

Plaintiff owned a lot running through from a street on which defendant's elevated railroad was constructed to another parallel street. On both ends of the lot were buildings fronting on their respective streets and wholly disconnected. Held, in an action for damages from the construc-

Mooney v. New York El. R. Co.

tion and operation of the road, that the allowance of damages for the rear structure was erroneous.

Where a decrease in rental value of premises is due in part to a change in the business character of the neighborhood, it is error to allow, as damages to such premises from the construction and operation of an elevated railroad, the whole difference in value before and after the construction of the road.

Defendants in such an action cannot object to the refusal of the court to allow evidence of the decline in rents of the neighboring property, where evidence of the same character offered by plaintiff has been excluded on defendants' objection.

APPEAL from a judgment of this court entered on a trial by the court without a jury.

The action was brought to recover for damages to plaintiff's premises, No. 899 Greenwich Street in the City of New York, from the construction and operation by defendants, in that street in front of the premises, of their elevated railway, and to restrain the maintenance and operation of the railway. Judgment was rendered for plaintiff for \$6,054.22 damages, and granting an injunction against the further maintenance and operation of defendants' railroad in front of the premises, unless defendants, within 30 days, should pay or tender to plaintiff the sum of \$7,000. From this judgment defendants appealed.

Davies & Rapallo, for appellants.

Charles Gibson Bennett, for respondent.

J. F. DALY, J.—The judgment should be reversed and a new trial ordered, because the court allowed damages for a rear building, which was not shown to be affected by the operation of the elevated railway, or the maintenance of its structure; and also because the award for damages and for injury to the fee value was excessive.

The plaintiff's premises are situated on the northeast corner of Greenwich and Beach Streets. The lot is 25 feet in width on Greenwich Street and 100 feet in depth on Beach Street, and is covered by two buildings, one of which is built on the

Mooney v. New York El. R. Co.

rear of the lot on Beach Street, is 25 by 50 feet, is wholly unconnected with the building fronting on Greenwich Street, and has its entrance and receives its light and air from Beach Street. The elevated railroad structure does not extend in front of this rear building.

The court did not distinguish between the front and rear buildings in its findings of the effect of the elevated structure and the operation of the road upon the plaintiff's premises, and admitted upon the trial, and against the objection of defendants, evidence of the rents received from such rear building. It is also apparent from the description of the premises, in the findings, which were found to be affected by the structure and operation of the road, that the rear building was included in the estimate of damage caused by the defendants.

It also appeared in evidence that the rental value of the premises was unfavorably affected by other causes than the construction, maintenance, and operation of the elevated road, yet the court allowed the plaintiff the whole difference, as testified to by plaintiff's witnesses, between the values of the premises before and after the construction of the road. The evidence shows that part of the decrease in rents, after the road went into operation, must have been due to changes in the business character of the neighborhood. Up to the time the elevated roads were built, or until about 1880, market wagons congregated in this part of Greenwich Street, and a larger trade was attracted to the stores in the neighborhood in consequence. Since 1880 the marketmen have gone up to the new market at "Fort Gansevoort," and the trade has followed them. This circumstance does not appear to have been given due weight in determining the actual damage occasioned by the elevated roads.

There seems also to be a good exception to a refusal to strike out hearsay testimony of a witness for plaintiff. The witness, W. Myers, a real-estate agent and expert, testified as to Greenwich Street property: "I cannot rent it: not one out of twenty who comes there will take Greenwich Street on account of the elevated road. That is what they told me."

People v. Rofrano.

Defendants moved to strike out the words "on account of the elevated road," which should have been granted.

The refusal of the court to allow evidence in behalf of defendants of the decline in rents of neighboring property, would have been error, had not defendants previously objected to plaintiff's showing the course of values in the immediate neighborhood. Their objection was that the evidence was "incompetent, irrelevant, immaterial, not within the issues, and not the proper measure of damages." The objection was sustained, and such evidence on plaintiff's behalf having been excluded on their objection, they could not be permitted afterwards to offer evidence of the same character. For the other errors, however, the judgment should be reversed and a new trial ordered, with costs to abide event.

BISCHOFF, J., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
against MICHAEL ROFRANO *et al.*, Defendants.

(Decided April 7th, 1890)

A recognizance in the sum of \$2,000, entered into June 20th, was declared forfeited, for non-appearance of the principal, and execution was issued thereon July 26th, and subsequently returned wholly unsatisfied. *Held*, that the forfeiture would not be remitted on payment of twenty per cent. of the amount, the principal never having been produced, both because the court had no power to entertain an application for a compromise of such a claim, and because of want of merits in favor of petitioner, the facts showing a fraud in entering into the recognizance or in subsequently secreting property.

APPLICATION to vacate a judgment on a forfeited recognizance.

Henry W. Unger, for the motion.

John R. Fellows, opposed.

People v. Rofrano.

BISCHOFF, J.—On June 20th, 1888, Grasson was indicted by the grand jury of this county on a charge of abduction and held to bail in the sum of two thousand dollars, such bail being given by the petitioner. On July 2nd the indictment was brought on for trial, and upon the failure of the accused to appear the bail was declared forfeited. On July 26th judgment upon such forfeiture was entered against petitioner, and execution against the property of the judgment debtor was issued on the same day. This execution was subsequently returned wholly unsatisfied. Since the forfeiture and entry of judgment thereon the accused has not been surrendered or brought to trial, and his whereabouts appear to be unknown.

Upon this state of facts, accompanied by an allegation of his insolvency and an offer to pay twenty per centum of the amount of the judgment in compromise, the petitioner asks that the forfeiture of the recognizance be remitted and the judgment entered thereon vacated.

The application is not accompanied by the certificate of the district attorney that by reason of the subsequent production of the principal the People have lost no rights and are in as good a position to prosecute as they were when the forfeiture occurred. Neither does it appear that the costs included in the judgment, or the expenses incurred in the apprehension or recapture of the principal, have been paid. Indeed, the facts prevent the giving of such certificate and proof, and in the absence of proof of these facts this application must be denied (See Laws 1882, c. 410 (Consolidation Act) § 1482). While this application is ostensibly for an order directing the remission of a forfeited recognizance, the facts presented manifestly transform it into an application for an order directing the compromise of a claim which is conceded to be valid and subsisting in favor of the People, and there is no provision of law authorizing this court to entertain such an application.

Neither do the facts show any merit in favor of the petitioner. The recognizance was entered into June 20th and forfeited July 2nd. On July 26th judgment was entered and

Phillips v. McNab.

execution issued thereon on the same day. This execution was subsequently returned wholly unsatisfied. All this occurred within thirty-six days, and it seems incredible, in the absence of explanatory facts, that within this short period the petitioner should have been reduced from apparent prosperity to complete insolvency. He must have represented, upon entering into the recognizance, that he was worth the sum mentioned therein over and above all debts and liabilities and property exempt by law from execution, and was therefore palpably guilty of fraud at that time or has since so effectually secreted his property that the People of the State of New York have been fraudulently prevented from realizing even a fractional part of their just claim.

LARREMORE, Ch. J., concurred.

Application denied.

MARY PHILLIPS, Respondent, *against* JAMES B. McNAB,
Appellant.

(Decided April 7th, 1890.)

Plaintiff delivered furniture to defendant under a contract to make certain repairs thereto. *Held*, that after waiting a reasonable time for such repairs to be made, she was not bound as a condition precedent to a demand to tender the money that would have become due if defendant had performed his contract; and that plaintiff could maintain an action for conversion against defendant alleging no superior right to possession.

Plaintiff in an action for conversion of furniture, left with defendant for repairs, is competent to testify as to its value, where it appears she had bought and sold second-hand furniture at auction, and had attended many such sales.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered on the verdict of a jury.

The facts are stated in the opinion.

Phillips v. McNab.

William G. McCrea, for appellant.

Arthur H. Ely, for respondent.

LARREMORE, Ch. J.—Although on the claim of conversion there is much immaterial matter in the complaint, yet it contains sufficient to make out a case of trover; and it was upon the motion of appellant's counsel that plaintiff, under order of the court, elected to proceed upon such theory of action.

Absolute, unqualified ownership is not necessary in order to authorize a person entitled to the possession of property to sue for its conversion. A person entitled to the temporary possession of chattels for a particular purpose may maintain such an action (Addison on Torts, marg. p. 524, and cases cited in note). In the case at bar there is probably enough evidence to support a finding that all title or interest of plaintiff's brother in the suite of furniture had been transferred to her before the commencement of this action. It certainly appears that, as between her and defendant, plaintiff was entitled to the exclusive possession and control thereof. Defendant acknowledges and ratifies plaintiff's right to the custody and disposal of the same by his letter of July 21st, 1886, in pursuance of which he received the property. Whatever may have been the former ownership of the furniture, or the former relations of the parties, the present cause of action arises because defendant obtained the furniture from plaintiff under a promise to return it to her after making repairs, and that he now refuses so to return it, though demand has been made. There is sufficient evidence of a demand, and the jury evidently believed plaintiff's testimony, and by their verdict established that the furniture was not put into good condition according to the contract. Therefore, after waiting a reasonable time for such repairs to be made, plaintiff was not bound, as a condition precedent to making a demand, to tender the money which would have been due if defendant had performed his agreement. Indeed, according to plaintiff's evidence, which the jury accepted as true, defendant positively refused to "put it in any better

Regan v. Traube.

order than it was then in," which she avers was anything but "good" order.

Nor was it error to admit plaintiff's own testimony as to the value of second-hand furniture. She alleged that she had attended many sales of such articles, and had herself bought and sold furniture at second-hand sales. This was sufficient to qualify her to express an opinion on this question, although she had never been regularly in the furniture business.

The judgment should be affirmed, with costs.

J. F. DALY and BISCHOFF, JJ., concurred.

Judgment affirmed, with costs.

DANIEL REGAN, Plaintiff, *against* BERTHA TRAUBE, Defendant.

(Decided April 7th, 1890.)

An order for service by publication in foreclosure proceedings bore the caption "At a Special Term," etc., and was made by the judge while actually on the bench in court, and was signed with his initials with the abbreviation, "Ent." It contained the usual impersonal recitals of a Special Term or "Court" order. *Held*, nevertheless, that it would be presumed, in favor of the regularity of the order, that it was the personal act of the judge, as a judge, as required by section 440 of the Code of Civil Procedure, and not as the embodiment of the court, in which case it would be nugatory.

Submission of controversy without action on statement of facts agreed upon.

Earley & Prendergast, for plaintiff.

S. M. Roeder, for defendant.

LARREMORE, Ch. J.—This is a controversy submitted to the General Term for determination upon an agreed state of

Regan v. Traube.

facts. Bertha Traube has made an agreement in writing to purchase a piece of real estate from Daniel Regan, and she refuses to complete, alleging a defect of title. The premises came to the present owner, through several mesne conveyances, from The New York Life Insurance Company, which had previously bid in the same at a sale under foreclosure of a mortgage held by it. Such action for foreclosure was in this court, and two of the defendants, being the owner of the equity of redemption and his wife, were served only by publication. The order for such service bore the caption "At a Special Term," etc.; it was made by the late Judge ROBINSON, and at the end thereof appears in the judge's handwriting "Ent. H. W. R." It further contains the usual recitals of a Special Term or "Court" order: "Upon reading and filing" certain affidavits and other papers, etc. Under section 440 of the Code which was then in force, and which prescribes that an order for publication shall be made, not by the Court, but by a judge, it is argued that the title deduced through such suit is fatally defective.

The question of the validity of orders in the form of this one, and made under very similar circumstances, has already been several times before the courts. In *Phinney v. Broschell* (80 N. Y. 545), the Court of Appeals followed and indorsed the General Term of the Supreme Court, in holding that the caption and the direction to enter might be disregarded, and the order treated as a chambers order. In that case it appeared affirmatively that the order was actually made by the judge out of court, and furthermore the recitals were more personal to the judge, beginning with the usual opening clause of a chambers order: "It appearing to my satisfaction," etc. In the controversy before us there is, it is true, an affidavit that the order was in reality a judge's and not a court order; but this is nothing more than an averment of a conclusion of law without alleging any facts to support it. Moreover the recitals in this order are the usual impersonal recitals of a Special Term order. Possibly therefore it might be said that the present controversy was distinguish-

Regan v. Traube.

able from *Phinney v. Broschell*. In *Coffin v. Lester* (36 Hun 347), the order also contained the Special Term recitals, and it was sustained, and the title upheld, on the ground that the case was brought within *Phinney v. Broschell* by a finding of fact not excepted to, that said order was granted not at the Special Term but at the private chambers of the judge who signed it. As above shown I do not think this circumstance does appear as matter of fact in the present case.

Nevertheless, I am of the opinion that the order, even in its unamended form, was valid and sufficient. It is my belief that much of the discussion in the various cases on this subject has strayed off into unprofitable casuistry. I speak with the greater freedom, because the Court of Appeals in *Phinney v. Broschell* did not reason the matter independently, but put the decision on the ground that they would not differ with the lower court on a point of this character. Further discussion on our part is not therefore precluded.

Assuming, as was probably the fact in the case before us, that the order was granted and signed by Judge ROBINSON while actually on the bench in court, I cannot see that it is any the less valid than the orders passed upon in the cases above cited. Certainly no one will claim that a judge's order is invalid simply because made in court. It would be absurd to argue that a judicial officer is less a judge in court than out of it. He may make chambers orders at any place, including the court room. It is the constant practice in this county, and elsewhere, to attend to *ex parte* business in court, in the intervals of hearing motions, and probably seventy-five per cent of the chambers orders granted are signed by a judge while on the bench. The situation then is that an order is presented to a judge, which, in one of his capacities, he has authority to make, and, in his other capacity of representative of the court, he has not authority to make. After exercising the judicial function of determining that the proofs and other papers submitted are sufficient, the officer on the bench signs the order. Such signature is sufficient though he uses only his initials, and the fact that his official

Regan v. Traube.

title is abbreviated is of course immaterial. In which of the officer's capacities should it be presumed that he acted: his capacity of judge, in which he had power, or his capacity of embodiment of the court, in which his act would have been nugatory? This is a question to be answered not by further metaphysical refinements of distinction, but by practical common sense, without which the attempted administration of justice would often degenerate into farce. The law gives a judge the authority to make such an order under certain conditions; all these conditions existed and satisfactory proof was furnished; the parties intended to follow the law and the judge intended to administer the law. It seems to me that under these circumstances such a strong presumption is raised that the officer did act as a judge, and not as the embodiment of the court, that the form of the order and the recitals and the direction to enter must be disregarded. Ignoring the peculiarly "Special Term" features, the order in its original form contained enough to make it an adequate vehicle for the remedy the judge had power to grant.

It also appears that the order in question has subsequently been amended by striking out the Special Term caption and recitals and the direction to enter, and inserting the usual formularies of a chambers order instead. I can see no objection to this if the parties desire it, and it seems that the Court of Appeals has approved of such action in a similar case. *Mojarietta v. Saenz* (80 N. Y.). But I should have no hesitation in voting to uphold the title, if the formal amendment had not been made.

Daniel Regan is entitled to a judgment for specific performance, with costs.

BISCHOFF, J., concurred.

Judgment for plaintiff, with costs.

Rice v. Maddox

HELEN A. RICE, as Administratrix &c. of Clement T. Rice,
Appellant, *against* ALICE MADDOX, Respondent.

(Decided April 7th, 1890.)

In an action by an administratrix to establish a copartnership between her intestate and defendant, and for an accounting, it appeared that such a partnership had existed, but that prior to April 26th, 1874, the intestate had received from the partnership business an amount equal to his advances; it did not appear that after that date he took any part in the the management or control of the business, or received any money on account of it, but defendant conducted it alone, and, from 1877, in partnership with another; between May 3d, 1874, and July 4th, 1879, the intestate borrowed small sums from defendant or said firm, which were not entered in the books of the business, except as a memorandum until repaid; on October 1st, 1874, as an insurance broker, he procured insurance on the property of the business in the name of defendant, and October 1st, 1875, procured a renewal thereof, and October 1st, 1879, procured a policy in the name of the new firm, and afterwards rendered a bill to them therefor, and received and receipted payment. *Held*, that this was sufficient to sustain a finding that the partnership between him and defendant was dissolved on or before October 1st, 1874.

APPEAL from a judgment of this court entered on the report of a referee.

The facts are stated in the opinion.

Thomas C. Ecclesine, for appellant.

Joseph Fettretch, for respondent.

J. F. DALY, J.—This action was brought to establish a copartnership between Clement T. Rice, the plaintiff's intestate, and the defendant Alice Maddox, and for an accounting of the copartnership transactions. The referee found that in November, 1869, Rice became a partner of the defendant and one Browning in conducting the business of a Russian bath and boarding establishment; that in the same month Browning withdrew, and Rice and the defendant continued the business thereafter; but that prior to April 26th, 1874, Rice had

Rice v. Maddox.

drawn out of or received from the business, including certain charges for board made in the ledger against him, an amount equal to his advances, and that it does not appear that after the last named date he took any part in the management of the business, or exercised any control over it, or drew out or received any money on account of any share or interest in it; that from April 26th, 1874, to the year 1877, defendant continued the business in the original place in Fourth Street, and in the latter year removed to Lafayette Place, to premises fitted up by her, and since October 1st, 1877, has conducted the business there in conjunction with one Ryan, under the firm name of Capes & Ryan.

The referee further finds that, between May 3rd, 1874, and July 4th, 1879, Rice borrowed small sums from defendant or the last named firm, which sums were not entered in the books of the business, except that a memorandum of the loan was made in the daily cash book and carried therein from day to day till paid; that on October 1st, 1874, Rice, in his capacity of insurance broker (in which business he was and had been for many years engaged), procured a policy of insurance upon the property of the bathing establishment in the name of the defendant as owner, and on October 1st, 1875, procured a renewal thereof; and on October 1st, 1879, procured a policy in the names of Capes and Ryan as owners, and on November 18th, 1879, rendered a bill to them for such insurance and received and receipted payment.

Upon these facts the referee found that the copartnership between Rice and the defendant was dissolved as early as October 1st, 1874, and that the cause of action for an accounting was barred by the statute of limitations, the action not having been commenced until the year 1886. I do not think that I could have come to any other conclusion upon the evidence in the case than that reached by the referee, with respect to the termination of all business relations between the defendant and the deceased, in the year 1874 or prior thereto. The statement of the facts as found by the referee is sufficient reason for his decision. The acts of the deceased

Rice v. Maddox.

after the last named date were wholly inconsistent with the claims now made by his administratrix (but never made by him as far as can be ascertained), that he continued to be a copartner of the defendant. He did not die until January, 1884, and it is a perfectly fair inference from the facts that if he had had any interest in the business he would have asserted it, or at least there would be some indisputable evidence of it, during the ten years prior to his death; and that if there had been any right to an accounting with the defendant he would have enforced it during the same period. The facts disclosed leave no room to doubt that not only was the copartnership dissolved, but that a final settlement was had between the parties. The onus was of course upon the defendant to show a dissolution, but it was satisfactorily shown. The finding by the referee that from October, 1871, the deceased gradually withdrew from the active management of the business, and left it in the hands of his copartner, and of Ryan their manager, is not inconsistent with the other findings; there is direct evidence, given by Ryan, of a settlement with deceased in full in behalf of defendant, on April 26th, 1874, and that the subsequent monetary transactions with deceased were in borrowing and repaying small sums of money. The accounts in evidence fully bear out this testimony; in no other way can the entries of small sums, almost always tallying in amount, within a few days of each other as to date of entry, be explained; it is hardly credible that these were advances to the copartnership and drafts against his account as copartner. The appellant claims that taking out insurance in the name of the defendant Mrs. Capes, and afterwards as Capes & Ryan, was not significant, because it appears that he did not begin in 1874 to insure in her name, but always, from 1869; but there is no evidence that prior to 1874 he took out policies in her name; Ryan swears only that when he went there in 1871 deceased was attending to her insurance; how the policies were taken out does not appear. The ledger account was closed April 26th, 1874; but appellant urges that there is no proof that this was done with

ROSS v. SIMON.

deceased's knowledge and consent; to this it may be answered that it is hardly probable that, if deceased remained a partner, he would or could remain in ignorance on this point.

The statute of limitations as set up in the answer was pleaded to the whole cause of action as alleged in the complaint and does not refer, as appellant argues, to the "money counts." The complaint alleges but one cause of action, and that is for an accounting of the copartnership. It is, however, objected that the settlement of April 26th, 1874, closed only the account for borrowed money, and was not a settlement of the copartnership accounts. It appears, however, from the transactions at and preceding that date, that there was nothing left unsettled at and after that date, and the settlement was final between the parties as to all dealings between them.

I think the judgment should be affirmed, with costs.

LARREMORE, Ch. J., and BISCHOFF, J., concurred.

Judgment affirmed, with costs.

JOHN B. ROSS, Appellant, *against* JOHN SIMON, Respondent,
et al.

(Decided April 7th, 1890.)

Under the provisions of the mechanic's lien law of 1875, giving a lien on a house, etc., to persons performing work in erecting it, etc., "with the consent of the owner," and requiring that the notice of lien shall state "the name of the owner, lessee, general assignee, or person in possession of the premises, against whose interest a lien is claimed (Laws 1885 c. 342 §§ 1, 4), a notice which states the name of the owner, and that the labor and materials for which a lien is claimed were done and furnished with his consent, is sufficient, although it does not expressly state that the lien is claimed against his interest.

A statement in such notice of "the name of the owner of the leasehold against whose interest a lien is claimed," is not exclusive, and does not estop the lienor from claiming also a lien against the interest of the owner. In a complaint to foreclose a mechanic's lien on a house, etc., for work and materials, an allegation that the owner had full knowledge of the erecting, etc., of the buildings, and consented to the same, and to the perform-

ROSS v. Simon.

ance of the labor and supplying of the materials by plaintiff, is a sufficient averment of "the consent of the owner," required by Laws 1885 c. 342 § 1, to create a lien against his interest, without alleging how or under what circumstances his consent was given.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court sustaining a demurrer to a complaint.

The action was brought to foreclose a mechanic's lien upon property owned by defendant Simon. He demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against him. His demurrer was sustained by the Special Term of the City Court, and from the judgment entered thereon plaintiff appealed to the General Term of that court, which affirmed the judgment. From that decision plaintiff appealed to this court.

James C. Delamere, for appellant.

Stephen Philbin, for respondent.

J. F. DALY, J.—The owner of the premises demurred because the lien, a copy of which is annexed to the complaint, did not contain the statement that the lien was claimed against the interest of the said owner; also on the ground that the allegation in the complaint that the defendant, the owner, had full knowledge of and consented to the doing of the work, was insufficient, there being no averment of any agreement or contract with him. The demurrer was sustained upon both grounds.

The lien act provides that persons performing work, etc., in erecting any house, etc., "with the consent of the owner," may have a lien upon the house and lot whereon it stands, and also provides that the notice of lien shall state "the name of the owner, lessee, general assignee, or person in possession of the premises against whose interest a lien is claimed." (Laws 1885 c. 342 §§ 1, 4.)

In the notice filed by this claimant is a statement that "the

name of the owner of the leasehold against whose interest a lien is claimed is Ignatz Schmitt, and the owner of the fee of said premises is John Simon. That the name of the person by whom claimant was employed and to whom he furnished such materials is N. B. Muir That said labor and materials were done and furnished with the knowledge and consent of John Simon, the owner of the fee of said premises.

The notice thus contained a statement of the fact which, by statute, gives a lien upon the interest of the owner, viz., that the work was done with his consent, and such statement is sufficient notice to him and all others that the lien thus given by statute is claimed against his interest. It is not prescribed that the notice shall state in so many words that the lien is claimed against such and such persons, but that the names of the persons against whose interest the lien is claimed shall be given. If, therefore, the names are given and the facts subjecting their interests to the lien are stated, the statute is satisfied. The fact that the plaintiff's notice expressly states "the name of the owner of the leasehold estate against whose interest a lien is claimed," is not exclusive, and does not estop the lienor from also claiming a lien against the interest of the owner. The case of *Moran v. Chase* (52 N. Y. 346) is in point. That case arose under the Kings and Queens County act of 1862 (Laws 1862 c. 478), which required the notice to state "the person against whom the claim is made, the owner of the building, and the situation of the building," and the notice stated that "the name of the person against whom the claim is made is S. B. Vreeland, and the said work and materials so furnished was by and at the request of said S. B. Vreeland," and that the owner was George K. Chase. It was held that a lien was acquired thereunder against Chase, the owner, notwithstanding the statement in the notice that the claim was against Vreeland only. This case is to be distinguished from *Jones v. Manning* (6 N. Y. Supp. 338, 25 N. Y. St. Rep'r 771), cited by appellant, for in that case the decision is put upon the ground that there was nothing in the notice to indicate that the lienor was seeking to

Ross v. Simon.

place a lien upon the interest of the party named. Here the notice fully apprizes all persons of the intent to charge the interest of the defendant.

It remains to be considered whether the allegations of the complaint are sufficient as a statement of a cause of action against Simon, the owner. The complaint sets forth in substance that the defendant John Simon was and is the owner of the premises described in the complaint, being a lot of land in the City of New York ; that he leased the lot and the house thereon for the term of 21 years from May 1st, 1888, to the defendant Ignatz Schmitt by instrument duly recorded ; that Schmitt assigned the lease to the defendant Barbara Schmitt ; that the defendant Muir contracted with her to do certain work, labor, and services and furnish materials in and about the erecting, altering, or repairing of the house or building on the premises for the sum of \$2,175, and so far completed the same as to become entitled to receive a sum largely in excess of the claim of plaintiff who, under contract with Muir, did certain plastering and furnished materials for the said building for the sum of \$245, upon which there is due \$120 ; and that the defendant John Simon, the owner of the fee of said premises, had full knowledge of the erecting, altering, and repairing of said buildings, and consented to the same and to the performance of the labor and supplying of the materials by the plaintiff as above set forth.

This averment is, I think, sufficient under the statute. It is not necessary to aver how, or under what circumstances, the consent of the owner was given, any more than it would be necessary to set out the particulars of a contract if the averment had been that the work was done under or pursuant to a contract with him. In other words, the evidence in support of the allegation of consent is not to be pleaded. What the liability, if any, of the owner may be found to be, upon the facts proved, is a wholly different question from that before us, which is concerned with the question of pleading only.

Under the Lien act of 1873 (Laws 1863 c. 486), giving a lien upon the house and lot where the work is done and materials

ROSS v. SIMON.

are furnished "with the consent of the owner," it was held that the simple consent of the owner is sufficient without proof of a contract by him for the improvements (*Otis v. Dodd*, 90 N. Y. 336.) In that case the lease with the owner contained a covenant for the erection of the buildings and improvements, which were to become a part of the freehold, and not to be removed at the expiration of the lease; and the court approves the doctrine in *Nellis v. Bullinger* (6 Hun 560), that the statute gives a lien as well where the owner consents to the erection of a structure upon his land, as where he directly contracts for its construction; and the decision in *Husted v. Mathes* (77 N. Y. 388), where the owner simply knew of the improvements made by the husband upon the land and consented to them, and it was held that her simple consent authorized the lien.

Upon these authorities it is clear that the allegation of consent on the part of the owner is sufficient by way of pleading. We have not now to deal with the question whether the facts to be proved will bring the case within the authorities holding the owner liable, whether the consent proved does or does not amount to an authorization of the work, as stated in *Ottiwell v. Muxlow* in this court (6 N. Y. Supp 518, 24 N. Y. St. Rep'r 38).

The judgment of the General and the Special Terms should be reversed and the demurrer overruled and judgment upon the demurrer in favor of plaintiff ordered, with costs, and, if so adjudged by the City Court, with leave to defendant to answer upon payment of costs.

LARREMORE, Ch. J., and BISCHOFF, J., concurred.

At the May General Term, 1890, the respondent made a motion for a reargument of the appeal, or for leave to appeal to the Court of Appeals, on which the following opinion was rendered, June 2d, 1890.

PER CURIAM.—[Present, LARREMORE, Ch. J., and ALLEN and BOOKSTAVEN, JJ.]—The appeal was from a judgment of the General Term of the City Court affirming a judgment upon

Schwab v. Heindel.

demurrer. There were but two questions upon the appeal. The first was whether or not the statement in the lien was sufficient as against the owner; and the second was whether the allegations in the complaint that the defendant, the owner, had full knowledge of and consented to the doing of the work, was a sufficient pleading of the facts. The reargument is asked for on the authority of *Cornell v. Barney* (94 N. Y. 394), which the respondent claims his counsel through inadvertence overlooked, and to which he failed to draw the attention of the court. But that case does not touch the question of the sufficiency of the notice of a lien in any way, and the sole question decided there was that, in order to bind the owner, the work must be done or materials furnished at his instance or that of his agent, and in the absence of evidence that the lessor had some connection with plaintiff's contract, plaintiff is not entitled to have or enforce a lien against the interest of the lessor in the land or building, but only against that of the lessee. This does not affect the question of what it is necessary to plead in the complaint in order to admit evidence to hold the lessor; it only goes as to what evidence would be required in such a case, and that distinction was expressly made by the General Term which reversed the judgment in this case.

The motion for a re-argument or for leave to go to the Court of Appeals will therefore be denied, with ten dollars costs.

Motion denied, with costs.

CATHERINE SCHWAB, Respondent, *against* CASPAR HEINDEL *et al.*, Appellants.

(Decided April 7th, 1890.)

In an action, tried before a referee, for the conversion of a horse, levied upon and sold by defendants as the property of plaintiff's husband, who used it in his business, testimony by plaintiff's attorney that he lent plaintiff money upon her statement that she needed it for the payment for a horse, is not admissible.

Schwab v. Heindel.

APPEAL from a judgment of this court entered on the report of a referee.

The facts are stated in the opinion.

M. J. Earley, for appellants.

Julius Heinderman, for respondent.

LARREMORE, Ch. J.—The defendants are sued as joint tort-feasors. The defendant Heindel had recovered a judgment against plaintiff's husband in the Ninth District Court, and execution was issued thereon to the defendant McCarty, a city marshal. The marshal levied on a horse which plaintiff claims was her property. The animal was, however, sold under the execution, and plaintiff joins, as a co-defendant in this action for conversion, the judgment creditor, alleging that he gave special directions to the marshal to take the horse; that he indemnified the marshal; and that he performed other acts which render him liable in damages.

The counsel for appellants assigns numerous grounds of error in the trial, but it will be unnecessary to consider more than one of them, as it is serious, and would in itself be fatal. It is evident that the pivotal question was as to the ownership of the horse. Defendants' contention was that the animal in reality belonged to the husband, and was therefore amenable to the levy. The plaintiff claimed that it was hers, although it was used in a business which the husband had conducted in his own name up to a short time before the recovery of the judgment, and which was then conducted in her name, but in practically the same manner in which it had been carried on before the pecuniary difficulties arose. Plaintiff admits that she had no money, other than what she received from this business or borrowed from her attorney. Said attorney went on the stand and testified that he had lent his client \$50, "upon her statement that she needed it for the payment for a horse." The learned referee admitted this evidence against appellants' objection and exception. It was

Shaller v. Morgan.

clearly incompetent, and without doubt must have had a strong influence in the decision of the question of ownership. It tended materially to corroborate plaintiff's own account of her alleged purchase of the horse.

It is elementary law that a party may not prove her own declarations, not made in the presence of the adverse party, in her own favor. This is precisely what the referee permitted to be done. Plaintiff's attorney testified, as part of plaintiff's case to support her cause of action, that she had stated to him that she needed the money for the payment for a horse. It was even a more serious violation of the elementary rule above stated, than if the declaration purported to have been made to an unprejudiced outsider. Here the attorney for the plaintiff, who of course is not unprejudiced or free from personal interest in the result, testifies to the party's declarations in her favor. It would be a very easy process to manufacture evidence in behalf of any person, on any subject, if such a practice could be tolerated.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

BISCHOFF, J., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

WILLIAM G. SHALER, as Receiver of the N. H. Leadbetter, Limited, Appellant, *against* GEORGE MORGAN, Respondent.

(Decided April 7th, 1890.)

L., the managing employe of a corporation, was indebted to defendant in the sum of \$50.75, while defendant was indebted to the corporation in the sum of \$59.68. Defendant tendered to L., at the company's office, \$50.75, and asked to have it credited on his account with the corporation, at the same time requesting L. to pay his indebtedness to defendant. L. took such

Shaller v. Morgan.

money, counted it, and paid it back to defendant, at the same time crediting defendant's account with the corporation with such amount. *Held*, that on these facts the jury was justified in finding a payment on defendant's debt to the corporation.

APPEAL from a judgment of the District Court in the City of New York for the Eleventh Judicial District.

The facts are stated in the opinion.

Hatch & Warren, for appellant.

Edw. C. O'Brien, for respondent.

BISCHOFF, J.—The N. H. Leadbetter, Limited, was a domestic corporation engaged in the livery and hack business in the City of New York, of which plaintiff was appointed receiver on or about November 1st, 1889. At the time of the appointment of the receiver defendant was indebted to the corporation in the sum of fifty-nine dollars and sixty-three cents for the hire of horses, etc., and this action was brought for the recovery of that indebtedness. For the purposes of the trial defendant conceded the facts respecting his indebtedness in the amount claimed, but contended that prior to the appointment of the receiver he had paid the same. In support of the defense of payment, defendant established the following facts upon the trial: On October 10th, 1889, defendant, at the office of the corporation, met Harry Leadbetter, the managing employe of it, who at the time was individually indebted to defendant for furniture sold and delivered to him in the sum of fifty dollars and seventy-five cents, and referring to his (defendant's) indebtedness to the corporation, the defendant produced the sum of fifty dollars and seventy-five cents, and placing the money on a desk requested Harry Leadbetter to apply the same in part payment of defendant's said indebtedness, at the same time intimating to Leadbetter that payment of the latter's debt to defendant was desired. It will be noticed here that the money actually produced was exactly equal to the amount of Leadbetter's debt to defend-

Shaller v. Morgan.

ant. Leadbetter took the money, counted it, and thereupon returned it to defendant with the request that defendant should apply the amount in satisfaction of Leadbetter's debt, and promising that defendant's debt to the corporation should be credited with an equal amount in part payment. With this understanding defendant accepted the return of the money. On the trial the right of Leadbetter to receive payment of money due to the corporation was not questioned, and the trial justice rendered judgment for defendant. Plaintiff, claiming the facts to be insufficient to prove payment, appeals to this court.

Whether or not the production of the money by the defendant, and the passing thereof to Leadbetter, was intended by both parties as a payment on account of defendant's indebtedness to the corporation, or only as a subterfuge to lend plausibility to the claim of payment, and whether or not defendant at the time of such alleged payment had surrendered all dominion and control over the money produced so that it became the property of the corporation and subject to its possession and control, are facts to be ascertained from the conduct of the parties and the surrounding circumstances as shown upon the trial. This action having been tried before the justice, without a jury, it was within his province to determine both the facts and the law applicable to them, and judgment having been rendered for defendant it must be assumed for the purposes of this appeal that every fact, in support of which there is some evidence, and which is necessary to sustain the judgment, was found by the justice. It may well be that upon the same testimony the appellate court would have arrived at a conclusion concerning the intention of the parties differing from that of the justice, but that alone is not sufficient to warrant a reversal (*Fixman v. Brown*, 14 Daly 110; 8 N. Y. St. Rep. 608.)

It must be accepted as established, therefore, that the sum paid by defendant was paid by him to, and received by Leadbetter, as the authorized agent or representative of the corporation, in part payment of defendant's indebtedness, and

Smith v. Pryor.

the money paid thereby became the property of the corporation. A subsequent misappropriation or conversion of such money by the agent or employe of the corporation, although with defendant's knowledge and participation, cannot operate to rescind or disaffirm the payment. Whatever redress plaintiff may have against defendant for his participation in the application of the property of the corporation to the payment of Leadbetter's individual debt, should be sought in the proper action.

The trial justice erred, however, in awarding judgment for defendant. A reference to the pleadings and proofs will show that plaintiff's claim was fifty-nine dollars and sixty-five cents, while the payment claimed by defendant was but fifty dollars and seventy-five cents, so that for the excess of his claim plaintiff should have had judgment against defendant.

LARREMORE, Ch. J., concurred.

Judgment reversed, with costs, and new trial ordered.

CHARLES G. SMITH, Appellant, *against* S. MORRIS PRYOR
et al., Respondents.

(Decided April 7th, 1890.)

No appeal lies to the Court of Common Pleas from an order of the City Court of New York either granting or denying a motion for a new trial upon the ground of newly discovered evidence.

No appeal lies to the Court of Common Pleas from an order of the City Court of New York refusing a new trial for alleged misdirection to the jury, unless an exception thereto has been taken upon the trial.

APPEAL from an order of the General Term of the City Court of New York affirming an order of that court denying a motion for a new trial, upon the ground of newly discovered evidence, and upon the ground of error in the charge of the justice to the jury.

Smith v. Pryor.

Saunders, Webb, & Worcester, for appellant.

Lowrey, Stone, & Auerbach, for respondents.

J. F. DALY, J.—No appeal lies to this court from an order of the City Court either granting or denying a new trial upon the ground of newly discovered evidence (*Lesser v. Wunder*, 9 Daly 70). The Court of Common Pleas holds the same position with respect to the City Court of New York City which the Court of Appeals holds with respect to the Supreme Court and the Superior City Courts (*Walsh v. Schultz*, 6 N. Y. Civ. Pro. Rep. 126; *Rowe v. Cornley*, 11 Daly 318); and the Court of Appeals will not entertain an appeal from an order of the last named courts granting or refusing a new trial (*Donley v. Graham*, 48 N. Y. 658; *Smith v. Platt*, 96 N. Y. 635, and cases cited). The court below did not refuse to exercise its discretion for want of power, or for any other reason, and the authorities cited by the appellant are not therefore in point.

No appeal lies to this court from an order of the City Court refusing a new trial for alleged misdirection to the jury, unless an exception thereto has been taken upon the trial. "When a trial and general verdict have been had we can deal only with questions of law arising upon exceptions duly taken." (*Rowe v. Cornley*, 11 Daly 318). There was no exception taken to the alleged misdirection of the judge pending the trial, and there is nothing for us to review.

The order appealed from should be affirmed, with costs and disbursements (*Burin v. Simmons*, 14 Daly 456; 15 N. Y. St. Rep. 370).

LARREMORE, Ch. J., and BISCHOFF, J., concurred.

Order affirmed, with costs.

Spies v. Voss.

MARIE SPIES, Respondent, *against* PHILIP VOSS, Appellant.

(Decided April 7th, 1890.)

Defendant took possession of plaintiff's premises under an oral understanding that if the premises were put in a certain order she would stay for a long time, the rent being payable monthly in advance. *Held*, under the statute relating to renting in New York City, that this created a tenancy until May 1st following.

A re-entry and re-letting by the landlord, after the premises are abandoned and the key returned by the tenant, do not, without further proof, establish a surrender and acceptance.

• APPEAL from a judgment of this court entered upon a verdict directed by the court.

The facts are stated in the opinion.

Felix Jellenik, for appellant.

Jacob Fromme, for respondent.

J. F. DALY, J.—There was no written agreement for the occupation of the premises and no term agreed upon, and the question is whether the tenancy continued to May 1st, 1888, or was for a month or from month to month, and whether there was a surrender and acceptance of the lease.

The wife of the tenant made the agreement on his behalf; she said that if the rooms were painted and fixed up she would stay a long time, for five years or eight years. She was told that the rent was \$58 a month payable monthly in advance. The painting was done, and the tenant moved in a few days after May 1st, 1887, paying rent from May 1st. A receipt was given for one month's rent, for each month up to and including September 1st, 1887. The tenant moved out October 1st, 1887, returning the key of the premises, which was retained, the landlord endeavoring to re-let the premises.

This case seems to fall within the statute which provides that an agreement for the occupation of lands or tenements in

Spies v. Voss.

the City of New York which shall not particularly specify the duration of such occupation shall be deemed valid until the first day of May next after the possession under such agreement shall commence, and the rent under such agreement shall be payable at the usual quarter days for the payment of rent in the said city unless otherwise expressed in the agreement. Here the duration of the occupation was not particularly specified: it was evidently intended to be for longer than one month, and not to be for one month or from month to month, as defendant claims it was. In the case of *Wilson v. Taylor* (8 Daly 253), relied upon by defendant, there never was any agreement as to the terms of hiring, but the tenant had remained in possession six years, paying a monthly rent of \$7.50 in advance. It was said in that case that, in the absence of any agreement, valid or invalid, as to the duration of the term, or as to an annual rent, the rule seems to be that the intervals between the payments determine the length of the tenancy; citing *Steffens v. Earl* (40 N. J. L. 137), where it was held that, where there is no evidence but the mere fact of payment at intervals of a week or a month, the implication is that the renting is a monthly or a weekly one, just as the payment is monthly or weekly. In *People v. Botsford* (47 N. Y. 666), it was held that where the tenant is in possession under a parol agreement void by the statute of frauds, and had occupied for a year, paying the rent monthly, a tenancy from month to month is created. If there had been in the case a specific agreement by parol for five years or for eight years which would be void under the statute of frauds, and the tenant went into possession, paying a monthly rent, a tenancy from month to month would have been created under the authority of the case last cited. If nothing had been said concerning the term, and the hiring had been at a certain monthly rent, a tenancy for a month only would have been created. But in the present case the parties contemplated a longer occupation than a month, as is apparent from the conversation between them; but as their agreement did not "particularly specify" the duration of the term, the case is within the

Spies v. Voss.

statute fixing the term as expiring on the first of May after entering upon possession. The fact that the rent was fixed at \$58 a month and was payable monthly does not affect the question, as the statute includes cases where the agreement provides how and when the rent shall be payable.

There was no surrender and acceptance of the lease. The tenant vacated the premises and offered the keys to the landlord, who refused to accept them, saying that the tenant had hired the premises for a year. The next day the keys were left in the landlord's house, who afterwards entered the premises and endeavored to re-let, succeeding finally in doing so for the month of April, 1888 (for which no rent is claimed). Under the authority of our General Term in *Winant v. Hines* (14 Daly 187 ; 6 N. Y. St. Rep'r 261, 1887), re-entry and re-letting by the landlord after the premises are abandoned and the key returned by the tenant do not constitute a surrender and acceptance, without further proof. If this decision seems to be in conflict with the case of *McKellar v. Sigler* in this court (47 How. Pr. 22, 1874), it may be noticed that in the latter case there was evidence that the landlord not only relet the premises but made alterations therein as well as repairs, acts taken together held to be inconsistent with the continuance of the tenancy.

The judgment should be affirmed, with costs.

BISCHOFF, J., concurred.

Judgment affirmed, with costs.

Talbot v. Doran & Wright Co.

ASHTON B. TALBOT, Respondent, *against* DORAN & WRIGHT
COMPANY, LIMITED, Appellant.

(Decided April 7th, 1890.)

In an action to recover margins paid defendant corporation as a broker in transactions in oil, plaintiff alleging that no purchases or sales were in fact made, where the relation between the parties is that of principal and agent, defendant doing the business on commission, plaintiff will be allowed an order for the examination of defendant's officers and an inspection of its books before trial. Plaintiff is entitled to know whether or not the transaction claimed by his agent in fact took place.

Where, in such case, it is sought to examine the principal officers of the corporation, plaintiff need not allege that such officers have knowledge of the corporation's transactions; that will be presumed.

If the books of the corporation are necessary to enable the officers of the corporation to testify as to plaintiff's account, their production will be compelled.

APPEAL from an order of this court denying a motion to vacate an order for examination of defendant's officers before trial, and for the production of its books and papers.

The facts are stated in the opinion.

Shepard & Osborne, for appellant.

Tracy, MacFarland, Boardman, & Platt, for respondent.

J. F. DALY, J.—The defendant corporation holds itself out as engaged in the business of broker, buying stocks, oil, etc., in the City of New York: the plaintiff, residing in Philadelphia, transmitted, through one Fleshman in that city, orders to defendant, in August, 1888, to purchase and sell oil for him on commission, depositing with Fleshman margins aggregating \$5,900, all of which were received by defendant less Fleshman's commissions. On August 31st, 1888, the transactions were closed by an order from plaintiff to defendant to buy oil to close the account; Fleshman reported that it had been done and that the plaintiff's loss was \$4,403, and

Talbot v. Doran & Wright Co.

paid over to him \$1,347 as a balance coming to him of the margins less the loss. The plaintiff charges that the defendant did not buy nor sell any oil as ordered by plaintiff, and demands judgment for the \$4,403 with interest from August 31st, 1888. An examination of the officers of the defendant corporation and an inspection of its books is sought for because, as plaintiff swears, it is impossible to show in any other way that the plaintiff's orders were not executed; also for the purpose of showing that defendant is not a broker doing a legitimate business, but is merely engaged in gambling, etc.; also for the purpose of proving that Fleshman is its agent.

The first objection made by defendant to the examination is that it is sought by plaintiff for the purpose of finding out whether he has a cause of action; and that examinations are never allowed for that purpose (*Lathrop v. Brown*, 5 Civ. Pro. Rep. 101; *Kirkland v. Moss*, 11 Abb. New Cas. 421; *Schepmoes v. Bousson*, 1 Abb. New Cas. 485; *Kaufman v. Herzfeld*, 1 How. Pr. N. S. 444). The cases first and last cited were similar to the present in that the examination sought was of parties who were stock or grain brokers, with respect to purchases and sales on account of a customer; and it was held that the examination could not be permitted where its object was to ascertain whether a cause of action or a counterclaim existed. But in the case of *Judah v. Lane* (14 Daly 308, 12 N. Y. St. Rep'r 130), where it was claimed that the defendant as broker for the plaintiff's assignor had bought and sold stocks and grain for him and had rendered accounts which the plaintiff claimed were false, the General Term of this court permitted an examination of defendant before trial. It was said in the opinion in the case that the allegations of fraudulent practices made in plaintiff's affidavit were to be taken as confessed because the motion to vacate the examination was made upon the plaintiff's papers; also that the plaintiff's accusations were substantiated by the facts set forth in his papers; but it is not necessary in order to obtain an order for examination that the plaintiff's alleged cause of action should be admitted, or that evidence in support of it

Talbot v. Doran & Wright Co.

should be set forth in the application for the order. The Code does not require it (§§ 872-3.) The case is an authority for permitting an examination of defendants for the purpose of ascertaining what dealings were actually had by the broker on account of his customer, where the latter, or his assignee, brings an action for that purpose. This is in accord with the decision of the General Term of the Supreme Court of this department in *Miller v. Kent* (59 How. Pr. 322), where the examination of the defendants, brokers, as to purchases and sales of land for the plaintiff, was allowed before trial in an action brought to compel an accounting. It was said by the court that "a commission merchant or broker has no right to conceal from his customer any portion of his business and dealings in relation to the property alleged to have been bought and sold; and where he withholds the fullest information on that subject, the right to examination before trial in an action brought to recover alleged profits, or to adjust the unsettled accounts, should be fully accorded." In both of the above cases it might have been objected that the object of the examination was to ascertain whether plaintiff had a cause of action; but this objection cannot be sustained where the relation of the parties is that of principal and agent, as in the case of a customer and his broker. That relation existed between the plaintiff in this case and the defendant corporation.

The second objection to the examination is that there is no good reason for the examination of defendant's officers before, rather than at the trial. This objection is not a good one where the fact to be determined is whether certain transactions were or were not had by an agent who has alleged them. The principal has the right to know the facts in advance of the trial in order to investigate such transactions and make preparations for the trial.

The next objection is that there is no allegation in the plaintiff's affidavits that the officers of defendant sought to be examined have knowledge of the fact whether oil was or was not bought or sold by defendant for plaintiff. To this objec-

Talbot v. Doran & Wright Co.

tion it may be answered that the defendant, being a corporation, could only buy or sell through its agent; that the parties required to appear and submit to examination are its officers and agents, who are presumed to have transacted its business and to know what business it did or did not transact and what orders it did or did not execute. If these officers (the president, vice president, and secretary) do not know the facts because some other agent was employed in the transactions, they can state who that agent was. But nothing of the sort is alleged; and as the books of the concern are to be produced upon the examination and the transactions, if any, appear upon them, it is only necessary for the parties under examination to identify the entries and testify what they know of the transactions represented by such entries.

This brings us to the next objection: that the affidavits do not show the facts necessary to support an order for the production and inspection of books and papers. Under the 7th subdivision of section 872 of the Code, the order for the examination of the officers of a corporation shall direct the production of books and papers as to the contents of which an examination or inspection is desired. This section applies to an examination "depending upon or ancillary to oral examination" (*Levey v. New York Central &c. R. Co.*, 13 Civ. Pro. Rep. 262); and in such a case the practice as to inspection of books and papers under section 805 does not apply. Here the object of the inspection of the books is to assist the officers of the defendant company to answer respecting the matters in dispute and to enable them, if they can, to identify the entries of transactions on plaintiff's behalf. As it is alleged that the name of the plaintiff does not appear upon the books, and that transactions in his behalf were designated and recorded under certain numbers by which his orders were transmitted to defendant, it is manifest that an inspection of the books can be of no assistance without an examination of defendant's officers, and this brings the case within subdivision 7 of section 872.

The objection that the allegations of the plaintiff's affida-

Williams v. Shields.

vits are upon information and belief, and that there is mere suspicion or conjecture as a basis for the examination, is not a sound one under the circumstances of this case. The plaintiff is entitled to the information he seeks from his brokers, and is not bound to make out a case against them as a condition of the examination. The case of *Central C. T. R. Co. v. Twenty-third St. R. Co.* (53 How. Pr. 45) applies to proceedings for inspection solely.

The order should be affirmed, with \$10 costs.

BISCHOFF, J., concurred.

Order affirmed, with costs.

RICHARD WILLIAMS *et al.*, Respondents, *against* DENIS SHIELDS, Appellant.

(Decided April 7th, 1890.)

A clause in a building contract that "should any dispute arise" respecting the terms of the contract or value of extra work, etc., the same should be settled by arbitrators to be selected by the owner and contractor, is not a bar to an action for extra work, where neither party made any effort to submit the controversy to arbitration.

APPEAL from a judgment of this court entered upon the report of a referee.

The facts are stated in the opinion.

B. G. Oppenheim, for appellant.

Scott Lord, for respondents.

LARREMORE, Ch. J.—This is an action to foreclose a mechanic's lien, and was tried before a referee, who has found in favor of plaintiffs, both for the balance due on the original contract and for the amount of \$702.38, claimed on account of alleged extra work. No objections have been made

Williams v. Shields.

to the technical sufficiency of the lien as filed. Appellant, however, contends that, at least as to said extra work, the complaint should have been dismissed, because the contract provided for the settlement of any dispute that might arise, as to compensation for extra work, by arbitrators. The clause in question is as follows:

“Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by _____ and his decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work, or of the works omitted, the same shall be valued by two competent persons—one employed by the owner and the other by the contractors—and those two shall have power to name an umpire, whose decision shall be binding on all parties.”

The learned counsel for appellant in effect argues that the existence of such provision in the contract is an absolute bar to any suit in a court for the recovery of the value of extra work. We cannot agree with him in this contention. The question was briefly referred to and passed upon in *Smith v. Alker* (102 N. Y. 87), at the close of the opinion, on pages 92 and 93, where it is held that it is as much the duty of the defendant as of the plaintiff to take active steps for the selection of arbitrators and the settlement of the disputed points by that method; and that if neither party has sought to avail himself of the privilege to submit the controversy to arbitration, the existence of such a clause in the contract will constitute no bar or defense to a suit at law for the amount alleged to be due. This is our understanding of the answer made by the Court of Appeals in a case similar in its facts, though not identical in form, and certainly analogous in principle, to the same argument appellant now urges; and we regard such decision as binding and conclusive upon us.

Appellant also contends that the learned referee did not decide the questions of fact that arose according to the fair preponderance of evidence. We have examined the record with care, and discover nothing to induce us to modify the

Williams v. Shields.

referee's findings. The conclusions of fact are not against the weight of evidence. There was much conflict in the testimony of the experts on both sides as to whether the job was done in a proper and workmanlike manner. The referee seems to have been considerably influenced by the fact that defendant voluntarily made two payments on account of the amount due for work, after the same had been completed, and, therefore, presumably with full knowledge of the alleged grave defects of which he now complains. This circumstance, with others, led the referee to conclude that the determination to dispute plaintiffs' bill was an after-thought. There is considerable force in this consideration; and, furthermore, we are unable to determine how much there was in the manner and appearance of the different witnesses, which induced the referee to believe plaintiffs' witnesses rather than defendant's. These elements may always legitimately be taken into account by a trial court. Moreover, one or two of defendant's witnesses made some very significant concessions in favor of the plaintiffs. It does not seem to be contended on behalf of the respondents that the work and materials were of the very best quality that could be supplied. It appears that the buildings in question were erected on leased premises, and one of the plaintiffs swears that defendant said that, as he (defendant) had only a ten years' lease of the premises, he wished as cheap a building to be erected as would pass the examination of the building department. The referee evidently believed this statement, and, taking it as true, it explains many of the criticisms upon the structure made by defendant's experts which might be sufficient to defeat the right of recovery in an ordinary case, where only first-class materials and workmanship were contracted for. It was obviously the intention of both parties that second-class materials should be made use of; and, under such circumstances, the questions whether or not the contract was substantially performed, and the extra work and materials were reasonably worth the prices charged for the same, were peculiarly questions of fact to be determined by the referee

O'Neill v. Howe.

upon all the evidence submitted. There is nothing to show that he did not decide the same in accordance with substantial justice and the real agreement of the parties.

Of course, as the owner permitted the contractors to go on and complete after the contract time had expired, and has since accepted the buildings, he cannot deny their right to sue for the contract price. There was sufficient evidence from which the referee might infer and find, as he did, that the delay in the completion of the buildings was caused by defendant's failing to carry out the contract on his part in not excavating and furnishing materials in time; by the necessary interference with the original plans on account of extra work ordered; and by the occurrence of rainy days. Accepting the referee's finding on this point, we think he correctly disallowed any claim for damages by reason of such delay in completion.

We have examined the other exceptions taken at the trial and points raised on this appeal, and do not find anything which induces us to interfere with the judgment as rendered, or requires any special notice.

The judgment appealed from should be affirmed, with costs.

BISCHOFF, J., concurred.

Judgment affirmed, with costs.

HUGH O'NEILL, Appellant, *against* EPHRAIM HOWE, Respondent.

(Decided May 5th, 1890.)

Under an agreement by defendant to pay plaintiff commissions on sales by plaintiff of defendant's goods, plaintiff cannot recover commissions on sales to the customers previously procured by him while in defendant's employ, without proof that such sales were made by him. The fact that the entries in defendant's books of the sales to such customers were marked with plaintiff's initials, such marks being made by defendant's bookkeepers for their own convenience in making up plaintiff's accounts, and not by defendant's order, is not sufficient proof that the sales were made by plaintiff.

O'Neill v. Howe.

A direction by the referee, in an action on account, that plaintiff proceed with his examination of a witness, in the absence of a ledger of defendant which he desired to use, is not ground for reversal, as plaintiff could have given notice to produce the ledger and then recalled his witness.

A notice to terminate a reference for a failure to file or deliver the referee's report within 60 days, under the Code of Civil Procedure, must be given before the report is actually filed or delivered, though after the 60 days.

A stipulation, made at the close of the first day's trial before a referee, that his fees be fixed at \$6.00 for the first hour and \$5.00 for every succeeding hour in a day's sitting, is valid.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered upon the report of a referee.

The facts are stated in the opinion.

Thomas Bracken, for appellant.

J. Woolsey Sheppard, for respondent.

J. F. DALY, J.—The plaintiff claimed for work, labor, and services, in the sale of defendant's goods on commission, at request of defendant, from March 1st, 1886 to May 23d, 1887. Upon the trial before the referee it appeared that he had been selling to certain customers of defendant for several years before that period, and the claim now made seems to be based upon the theory that he is entitled to commissions upon all subsequent sales by defendant to those customers, whether he can or cannot prove that such subsequent sales were, in any instance, made by him. This is apparent from the fact that the plaintiff is not able to give testimony as to any sale during the period specified in his complaint, but bases his right upon the fact that sales to such persons during said period appear upon defendant's books; thus, in his direct examination, he says, in answer to the question, "Look at the bill of particulars shown you and state when, giving the date as near as you can, you sold Mrs. Agnew?" he answers "Mrs. Agnew was my customer and all that she bought I claim;" and afterwards says that he cannot state how much goods he sold her; that he knows he sold to her

O'Neill v. Howe.

by defendant's books. In respect to sales to Mr. Bulger he says: "He was my customer and I claim all sales." So with respect to Mr. Bach he says, in answer to the question, "You say you sold Mr. Bach \$7,432.97 during the year 1886?" "A. According to your books: yes;" but in answer to the further question whether the books show anything more than a bill of goods from defendant to Bach, he answers: "Not that I know of." With respect to sales to Carberry he says: "I don't recollect any particular transaction that I sold him goods during the year 1886; that applies to all my testimony given upon the transactions in regard to sales." He afterwards swore that there might be a few parties from whom he brought orders during the period covered by his complaint; that he did not negotiate a sale to Bach (whose account on the books was, as before stated, \$7,432.97); that he ceased to be in the employ of defendant in the latter part of 1885 or the spring of 1886; that he previously kept a book in which he entered his sales, but ceased to enter for 1886, because he was working in Mr. Tracy's, and sent postal cards whenever he got an order. The defendant rendered him an account of his sales, including the period in question, and offered to pay him the amount of commissions computed thereon. He was allowed a recovery for this amount (which was admitted by the answer) but for nothing further.

I do not see how the finding of the referee can be disturbed by us. The mere fact that the plaintiff had originally made sales to certain customers, and that after he left the plaintiff's employ they bought more goods, does not make out a case for commissions upon such later purchases. If it did, then he would be entitled to commissions upon sales by defendant to such persons as long as defendant continued in business, irrespective of any efforts of his own to induce such sales. No such continuing liability of defendant could be enforced without some proof of a contract to that effect. Ordinarily the leaving of defendant's employ would terminate the contract for a commission on sales and any claim for commissions where, as in this case, the claim is based upon work, labor,

O'Neill v. Howe.

and services in the sale of goods at defendant's request. It is true that some of the customers, called by plaintiff as witnesses, swear that all they bought, they bought through plaintiff; but this testimony is very loose and general; it is a conclusion of the witness rather than a statement of fact; and further, it is not shown that the sales to those persons entitle plaintiff to more than he received. It is also true that the accounts of the customers in defendant's books (upon which accounts plaintiff demands these commissions) are marked with the name or the initials of plaintiff in order to designate them as his customers; but these marks were originally made upon old accounts while plaintiff was in defendant's employ and were continued on the subsequent accounts by the book-keepers; and such designation so made does not prove that such later sales were made by plaintiff; besides, the marks were put there by book-keepers of defendant for their own convenience in making up the plaintiff's accounts, and not by order of the defendant.

There was a conflict of testimony as to whether the agreement between plaintiff and defendant was for a commission upon sales or upon collections made by him, and the referee found it was the latter. The evidence is ample to sustain the finding.

The counterclaim was proved. It was shown that the sales made by defendant to "Dugan" were really made to plaintiff. Conklin swears that plaintiff told him that he owned the "Dugan" business and that he wanted the goods sent in Dugan's name.

The exceptions were not well taken. The motion to strike out the stipulation as to stenographer's fees was denied upon the question of fact. Appellant, in his brief, states that it was inserted without his knowledge, but this ground was not stated in the motion to strike out.

There is no exception at folio 59. The question at folio 113 as to statements made by plaintiff to a third party was not competent evidence for plaintiff and was properly ruled out. The written or printed contents of a card not produced

O'Neill v. Howe.

as to which a question was asked at folio 116 was properly ruled out. No exception will lie to the allowance of a leading question (at fo. 119); leading questions are in the discretion of the referee. The appellant refers to a number of other exceptions as valid without arguing them upon his brief. An examination of the record discloses no error in the rulings excepted to. The exception at folios 186 and 187 to the direction that plaintiff proceed with his examination, in the absence of one of defendant's ledgers which he desired to use, is not ground for reversal. The plaintiff should have given notice to produce the ledger and then recalled the witness. As to the exception at folio 256, no question was disallowed; the cross-examination of defendant upon his books was fully permitted. The evidence disallowed at folios 270 and 271 seems to be immaterial. There is no exception at folio 272. The other rulings complained of do not show error on the part of the referee.

There can be no question as to the filing of the referee's report. The Code expressly states that the notice to terminate the reference (where a report is not filed or delivered within 60 days) may be served before the report is filed or delivered. This was not done in this case. The report was filed before the notice was given. The case of *Little v. Lynch* (99 N. Y. 112), relied upon by appellant, was a case in which the notice was given before the report was delivered or filed.

The stipulation to pay referee's fees at the rate agreed upon, which stipulation is manifested by an entry in the minutes, is valid (Code § 3296). The case of *Bank v. Tamajo*, (77 N. Y. 476), relied upon by appellant, was a decision under section 313 of the former code. A like stipulation as to stenographer's fees would seem to be equally effectual. There is satisfactory evidence in the case that such stipulations were made.

The judgment and orders appealed from should be affirmed, with costs.

BISCHOFF, J., concurred.

Lane v. Humbert.

LARREMORE, Ch. J.—No error appears for which we can grant a reversal. There was some evidence to support the referee's finding reducing plaintiff's claim, and, on an appeal from the City Court, this court has no power to reverse a judgment, because we might deem that the weight of evidence was against the referee's decision (*Farley v. Lyddy*, 8 Daly 514).

The facts to support defendant's counter-claim were not controverted, and we think the referee correctly held that they made out a good cause of action. The statute of frauds does not apply; the original credit was given, not to Dugan, but to plaintiff.

The notice of plaintiff's election to end the reference was nugatory because, although more than 60 days had expired since the cause was submitted, said notice was not served until after the report had been actually delivered (Code Civ. Pro. § 1019; *Gregory v. Cryder*, 10 Abb. N. S. 289).

The judgment appealed from should be affirmed, with costs.

Judgment affirmed, with costs.

GEORGE W. LANE *et al.*, Respondents, *against* ELIAS C. HUMBERT, Appellant.

(Decided May 7th, 1890.)

A deposit of \$100 in lieu of the undertaking in the sum of \$500 required by section 1326 of the Code of Civil Procedure on appeal from the City Court, is inadequate, as section 1306 requires that a deposit in lieu of an undertaking shall be equal to the amount for which the undertaking is required to be given; but in such case opportunity will be given appellant to perfect the appeal.

MOTION to dismiss appeal for want of prosecution and for irregularity.

Lane v. Humbert.

Hascall, Clarke, & Vanderpoel, for the motion.

P. C. Talman, opposed.

PER CURIAM.—[Present, LARREMORE, Ch. J., and J. F. DALY and BISCHOFF, JJ.]—Section 1326 of the Code provides that, to render an appeal effectual for any purpose, the appellant must give a written undertaking to the effect that he will pay all costs and damages which will be awarded against him on the appeal not exceeding five hundred dollars. This the appellant did not do, but instead procured an order from a judge of the City Court staying all proceedings on the part of the respondents pending the appeal to this court upon the deposit of one hundred dollars with the clerk of that court in lieu of the required undertaking. Section 1306 of the Code provides that where a deposit of money is made instead of security, such deposit must be in a sum equal to the amount for which the undertaking is required to be given. Therefore the deposit is inadequate, and the appellant has failed in that respect to perfect his appeal as required by law. But this is an irregularity which may be cured.

The appellant also failed to serve the papers required within the time prescribed by the rules and practice of this court, although we think his counsel, in his affidavit, has sufficiently excused his laches in this respect.

The motion to dismiss the appeal will therefore be denied, provided the appellant applies at Special Term on or before the 9th instant for leave to perfect his appeal as required by law, and stipulates to argue the said appeal at this General Term on or before the 15th instant; otherwise the appeal will be dismissed, with costs. Ten dollars costs of this motion to the respondents to abide the event.

Order accordingly.

People v. Kurtz.

PEOPLE OF THE STATE OF NEW YORK, Plaintiffs, *against*
LEOPOLD KURTZ *et al.*, Defendants.

(Decided May 7th, 1890.)

A judgment entered on a forfeited recognizance cannot be vacated where it is not shown that the principal has either surrendered himself or been surrendered by his surety, or that the surety has made diligent efforts to secure and surrender him; nor unless the certificates of the district-attorney, that the people have lost no rights by reason of the failure of the surety to produce the principal, and of the sheriff, that all fees and charges have been paid, are presented. That the surety had no notice to produce the principal on the day when the recognizance was forfeited cannot avail; a party under recognizance may be called on any day during the continuance of the court.

MOTION to vacate a judgment entered on a forfeited recognizance.

J. N. Miller, for the surety, defendant, for the motion.

J. R. Fellows, District Attorney, opposed.

PER CURIAM.—[LABREMORE, Ch. J., and J. F. DALY and BISCHOFF, JJ.]—The principal was indicted on the 25th of October, 1888, for the crime of grand larceny and for criminally receiving stolen property. He was arrested, and on the 23rd of November, 1888, he, together with the surety, entered into a recognizance in the sum of fifteen hundred dollars for his appearance to answer the indictment. The case was on the calendar of the Court of General Sessions on the 11th of April, 1889, when the principal failed to appear and the surety did not produce him according to the terms of the recognizance, which was thereupon forfeited, and afterwards judgment was duly entered upon such forfeiture.

The papers submitted fail to show that the principal has either surrendered himself or been surrendered by his surety, or that the surety has made diligent efforts to secure the principal and surrender him. Under such circumstances an

Ash v. Purnell.

application to discharge a judgment entered upon a forfeited recognizance, made before the prisoner is produced or tried or a *nolle prosequi* entered, is premature and cannot be considered (*People v. Fields*, 6 Daly 410; *People v. Deery*, Id. 493).

It is also required by law that, upon a motion to vacate and set aside a judgment on a forfeited recognizance, the certificate of the district attorney that the people have lost no rights by reason of the failure of the surety to produce the principal in compliance with the terms of the recognizance given by them, and also a certificate of the sheriff that all fees and charges have been paid, must be annexed to the application (Laws 1882, c. 410, §§ 1482, 1483). The applicant has failed to present such certificates.

The fact that the surety had no notice to produce his principal on the day when the recognizance was forfeited cannot avail, because a party under recognizance may be called on any day during the continuance of the court (*People v. Blankman*, 17 Wend. 252).

The application should therefore be denied, with ten dollars costs.

MAGNUS ASH, Appellant, *against* JAMES E. PURNELL *et al.*,
Respondents.

(Decided June 2d, 1890.)

A petition and precept in summary proceedings by a landlord, served upon sub-tenants, and describing them as "John Doe and Richard Roe, under-tenants," whose true Christian names are not known to the landlord, is sufficient to give the justice jurisdiction under section 2235 of the Code of Civil Procedure, which requires such petition to name or otherwise intelligibly designate the person or persons against whom the proceeding is instituted, and to specify who are principals or tenants and who are under-tenants or assigns.

A warrant in summary proceedings for the removal of a tenant is "issued," within the meaning of sections 2251 and 2253, and cancels the lease of sub-

Ash v. Purnell.

tenants made parties to the proceedings, where it is signed by the justice and delivered to the clerk, though it is never executed.

APPEAL from a judgment of the District Court in the City of New York for the Eleventh Judicial District.

The facts are stated in the opinion.

Alexander & Ash, for appellant.

Marbury & Fox, for respondents.

BOOKSTAVEN, J.—This action was brought by the plaintiff to recover rent for the months of November and December, 1889, of two rooms in the building No. 61 West 14th Street in this city. The entire premises were under lease to the firm of Anderson & Blatt, who sublet a portion to the plaintiff, and of his part the plaintiff sublet the two rooms in question to the defendants. Anderson & Blatt were in arrear for rent, and for this reason, on the 12th of October, 1889, the landlord commenced summary proceedings in the Sixth District Court against them and their undertenant, to recover possession of the entire premises. The precept was issued on that day and made returnable on the 15th of October, 1889. A copy of this was served on Anderson & Blatt personally, and another copy was affixed in a conspicuous place on the premises of the plaintiff and defendants, and another copy was handed to the defendant Purnell personally. Both the plaintiff and the defendants in the petition and precept were described as "John Doe and Richard Roe, undertenants," whose true Christian names were unknown to the landlord. Upon the return day, no cause being shown, the justice made his final order awarding to the landlord the delivery of the possession of the premises, and on the same day the justice signed a warrant directed to the sheriff, or to any constable or marshal of the City of New York, describing the property, and commanding the officer to remove the tenants and undertenants from the premises, and to put the landlord in full possession

Ash v. Purnell.

thereof, which was on the same day delivered to the clerk of the Sixth District Court, where it has ever since remained. On the trial it was admitted that the plaintiff was the subtenant of Anderson & Blatt, and it was proved that the defendants were subtenants of the former. It was not claimed that the defendants had occupied the premises for any part of November and December, 1889, to recover the rent for which months this action was brought. They had moved out sometime in the month of October.

The defendants introduced in evidence, under plaintiff's objection, the summary proceedings above set forth, and claimed that by reason thereof the relation of landlord and tenant, as between the parties to this action, was annulled, the lease cancelled, and the plaintiff could not recover. The justice so decided, and dismissed the complaint.

The plaintiff claimed that, as neither of the parties to this action were made parties to the proceedings, they were not bound by them, and that the justice had no jurisdiction to issue any warrant for their removal, and the lease was not cancelled. This contention is based on the fact that in the landlord's petition, the names of Anderson & Blatt were inserted as tenants, but the parties to this action were designated as "John Doe and Richard Roe, undertenants," and it was not averred they were fictitious names used in ignorance of the true names. This court has held that such averment must be made in actions (*Gardner v. Kraft*, 52 How. Pr. 499), and it doubtless should be done in all proceedings where fictitious names are used in ignorance of true names, or there will be danger of rendering the proceeding void. But section 2235 of the Code, regulating the contents of the applicant's petition for a precept, only requires the naming or otherwise intelligibly designating the person or persons against whom the special proceeding is instituted, and if there are two or more such persons, and some are undertenants or assigns, specifying who are principals or tenants and who are undertenants or assigns. This provision does not require any name to be used in the petition; it is sufficient if the

Ash v. Purnell.

persons against whom the proceeding is instituted are intelligibly designated therein, and under the circumstances of the case, we think the phrase "John Doe and Richard Roe, undertenants," used in the petition, was a sufficient compliance with the statute as to the parties to this action. The fact that the names John Doe and Richard Roe were fictitious was stated in the precept, and there is no claim that any one was misled by not stating that fact in the petition. There is no pretense that the parties interested did not know for whom the precept was intended. Indeed, the defendants who were designated as "John Doe and Richard Roe, undertenants," moved out of the premises in consequence of the proceedings founded on this petition. We therefore think the justice obtained jurisdiction of the parties to this action. The case of *Croft v. King* (8 Daly 265), is not in conflict with this opinion, as in that case the undertenant was neither named nor designated in the proceedings.

The question then remains whether the relation of landlord and tenant, as between the plaintiff and defendants, was annulled, and the lease cancelled, by the summary proceedings. In *Boehm v. Rich* (13 Daly 62), this court held that, where the landlord sues out a precept commanding the tenant forthwith to remove from the premises or show cause before the justice, at a time fixed in the precept, why the premises should not be delivered up to the landlord, and the tenant complies with the precept and removes as he is commanded to do, it is a surrender and acceptance of the premises, and that no rent can become due thereafter on the lease. And we think this clearly right, for the further continuation of the proceeding by the landlord is unnecessary, as he gets just what he asked for and brought proceedings to compel. In *Brown v. The Mayor* (66 N. Y. 385, at page 391), the Court of Appeals, in speaking of summary proceedings, said, "If the person proceeded against obeys the summons and removes from the premises before the return day, he can appear on that day and show the fact of his removal, and then no warrant can be issued If he does not appear at all, he

Ash v. Purnell.

admits the allegations contained in the affidavit, and the magistrate is bound to render judgment and issue his warrant against the tenant and other persons in possession or claiming possession."

In case the tenant moves out, in compliance with the command of the precept, before the return day, the tenancy is terminated by the act of the parties, although no warrant can issue at any time. So, too, after final order, which we think is in effect a judgment, and the only one which can be rendered in such case, it may be satisfied by a voluntary compliance with its requirements on the part of the tenant just as effectively as if the warrant had been issued, and in fact it is his duty to go out without waiting to be dispossessed under the warrant. In both cases the lease is terminated or cancelled without the issuing of the warrant. In *Gallagher v. Reilly*, which will be announced at this General Term, the learned Chief Judge, by an entirely independent investigation, has arrived at the same conclusion.

If the lease between the landlord and principal tenant is terminated or cancelled in either of these two ways, there is no foundation on which the right of the subtenants to remain in possession can rest; they would at any time be subject to removal by the landlord on taking proper proceedings for that purpose.

But, it may be asked, what then is the meaning of section 2235 of the Code, which says "the issuing of the warrant for the removal of a tenant from the demised premises cancels the agreement for the use of the premises . . . and annuls accordingly the relation of landlord and tenant?" The answer is obvious. The section is meant to apply to cases where the tenant does not move out; in such case the issuing of the warrant cancels the agreement and annuls the relation of landlord and tenant. But it was not intended to restrict the cancellation of a lease to that one method.

In this case neither the tenants nor subtenants went out before the return day of the precept, nor did they appear before the justice on that day. He was then "bound to render

Ash v. Purnell.

judgment and issue his warrant." The former of these he did by indorsing the final order on the papers, and on the same day he signed the warrant and delivered it to the clerk of his court, who was its proper custodian until called for. With this act the justice's jurisdiction over the proceeding terminated. After the expiration of the time limited by law to do this, he had no further power over it, and could not even amend the final order or the warrant (*Carpentier v. Willett*, 6 Bosw. 25, aff'd 1 Abb. Ct. App. Dec. 312).

It was no part of his duty to deliver the warrant to the officer who was to execute it. He had done his whole official duty when he delivered the final order and warrant to the clerk; had he become incapacitated the next moment, any officer authorized to execute such warrants could have done so. We think therefore that the warrant had been issued, within the meaning of sections 2251, 2253, and consequently defendants' lease was cancelled, and the decision of the justice dismissing the complaint was right.

The plaintiff's counsel, in his argument, does not distinguish between a judicial and a merely ministerial act. Of the latter class is the issuing of an execution, an attachment, a summons, and the like, in which cases the process is not issued until delivered to the proper officer for execution; to the former belong the issuing of a bench warrant by a magistrate, the issuing of a citation by a surrogate, etc., and the issuing of a warrant in summary proceedings, in which cases the paper is issued when delivered to the clerk ready for use.

The contention that the issuing of a warrant only cancels the lease between the landlord and his immediate tenant, and does not affect leases between subtenants, is in the teeth of the warrant provided for in section 2251 of the Code, for that says it shall command the officer "to remove all persons" from the premises, which, if done, would most effectually terminate any lease between subtenants. As before shown, it is the tenant's duty not to wait for this, but to go out voluntarily, which the defendants did in this case.

Buddin v. Fortunato.

Had the defendants remained in possession of the premises leased by them for any part of the months to recover the rent of which this action was brought, they would have been liable to pay rent for the time they stayed.

The judgment should therefore be affirmed, with costs.

LABREMORE, Ch. J., concurred.

Judgment affirmed, with costs.

THEODORE BUDDIN. Respondent, *against* **MAICHO FORTUNATO,** Appellant.

(Decided June 2d, 1890.)

One who has entered into a contract with a city to do blasting in a street, the work being intrinsically dangerous to others, is liable to any person injured by negligence in doing the work, even though it be negligence of a subcontractor with him therefor.

Where demised premises are injured by negligent blasting, the lessee may recover damages for repairs made by him, necessary to protect his property or to make the premises tenantable after the injury; it not appearing that the landlord was bound by any covenant to keep the building in repair.

One with whom a carriage has been left by the owner to be repaired, being at most a bailee for hire, cannot recover for injuries thereto caused by negligence of a third party.

APPEAL from a judgment of the District Court in the City of New York for the Eleventh Judicial District.

The facts are stated in the opinion.

C. H. Preyer, for appellant.

D. Edgar Anthony, for respondent.

BOOKSTAVEN, J.—The action was brought to recover damages to plaintiff's property caused by alleged negligence in blasting. On the trial it was proved that the defendant had entered into a contract with the City of New York to do cer-

Buddin v. Fortunato.

tain work which involved the necessity of blasting in Ninety-first Street, in the vicinity of plaintiff's premises. By the terms of this contract, he was precluded from subletting any part of it except by a consent in writing on the part of the city indorsed on the contract. No actual negligence or want of skill on the part of defendant was proved, and his counsel moved to dismiss the complaint on this ground, which was denied, and defendant excepted. He also endeavored to show in his defense that he had sublet the contract to one Nicholas Fortunato; that the latter was doing the work, and he was in no manner interested in it except as to the result; that he had no control over the manner, mode, or means used to obtain the result, nor over the workmen employed, and consequently he was not liable to the plaintiff for any negligence on the part of Nicholas or his servants. Evidence tending to prove these facts was excluded, and defendant excepted.

It is well settled, as appellant contends, that, as a rule, in actions for damages caused by alleged negligence, either actual negligence must be shown, or facts and circumstances proved from which the inference of negligence can be fairly and reasonably drawn; and it is equally well settled that one person cannot be held for the damage caused by the negligence of another unless the relation of master and servant, or principal and agent, exists between the person sought to be held and the person whose negligent act is complained of. But both of these rules have their exceptions, and an action brought to recover damages caused by blasting is one of them. In *Hay v. Cohoes Co.* (2 N. Y. 159), the court expressly held that in such an action the defendant was liable for such injuries although no negligence or want of skill was alleged or proved; and in *Tremaine v. Same* (Id. 163), in the same kind of action, it was held that evidence tending to show that the work was done in the most careful manner was inadmissible, there being no claim to recover exemplary damages. See, also, *St. Peter v. Denison* (58 N. Y. 416).

In the case under consideration, the defendant contracted

Buddin v. Fortunato.

with the city to do all requisite blasting. This was, from its nature, dangerous. When the undertaking is one intrinsically dangerous to others, the person undertaking it is not relieved from responsibility to any person injured thereby, although he has entered into a contract with some person to perform it, and the injury has occurred through the negligence of the latter (Moak's Underhill on Torts, 277, and cases cited; *Hexamer v. Webb*, 101 N. Y. 387). The theory on which the case was tried by the court below was entirely correct, and it committed no error either in refusing to dismiss the complaint, or in excluding evidence offered by defendant.

In awarding judgment, the court allowed certain items for damage to the premises, of which the plaintiff was only lessee, and also for injuries to a phaeton, which did not belong to him at the time. The appellant contends it was error to allow either of these items. As to the damage to the premises, the lease is not before us, and it does not appear that the landlord was bound by any covenant to keep the building in repair; and, in the absence of such proof, none will be inferred (*Witty v. Matthews*, 52 N. Y. 512; *Howard v. Doolittle*, 3 Duer 464). Besides, it appears from the evidence that it was necessary for the plaintiff to make some of the repairs he did in order to protect his property, and all of them to make the building tenantable after the injury. Therefore, we think these items were properly allowed. Nor can the defendant be made to pay twice for such damages, as what he is compelled to pay for that purpose in this action could not be again recovered by the landlord in any action he may bring for injury to the freehold.

As to the phaeton, the plaintiff was not the owner of it at the time. It had been left with him to be painted. At most, he was a bailee for hire, and bound to use ordinary care only (*Fox v. Bruden*, 3 Daly 187). He was not liable to the owner for the injury occasioned by the wrongful act of another. It was therefore error to allow damage to it; and the judgment must be reversed for this reason, and a new trial ordered, with costs to the appellant to abide the event, unless the plaintiff

Byron v. Bell.

iff, within ten days, stipulates to reduce the judgment by \$37.00, the amount allowed for such damage, in which event the judgment will be affirmed, without costs of this appeal to either party against the other.

LARREMORE, Ch. J., concurred.

Order accordingly.

JOHN H. BYRON, Respondent, *against* EDWARD T. BELL *et al.*, as Administrators, etc., of HENRY R. LOW, Deceased, Appellants.

(Decided June 2d, 1890).

The provision in a contract for railroad construction that the work shall be executed and performed under the direction of the chief engineer or his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work performed shall be determined, does not prevent an appeal to the courts in case of fraudulent or unjust conduct of the engineer; and in such case testimony of other experts is allowable.

APPEAL from a judgment of this court entered upon the verdict of a jury.

The action was brought to recover a balance alleged to be due and unpaid for work done under a contract between plaintiff and defendants' intestate, and damages for loss of profits on work covered by the contract which plaintiff alleged he was prevented from doing by the intestate.

Defendants' intestate, having entered into a contract with the New York and Scranton Construction Company for the construction of a railroad, sublet a portion of the work to plaintiff. Their contract contained these provisions:

"The work shall be executed and performed under the direction of the chief engineer (or his assistant), by whose measurements and calculations the quantities and amounts of

Byron v. Bell.

the several kinds of work performed under this contract shall be determined, and who shall have full power to reject and condemn all work or materials, which, in his opinion, do not fully conform to the spirit of this agreement, and to decide every question that may or can arise between the parties relative to the execution of the work, and his determination shall be final and binding upon both parties."

"It is further agreed that payments shall be made monthly on or before the fifteenth day of each month, as the work progresses, on the certificate of the chief engineer, based upon his current estimates of the amount of work done, material furnished, calculated at relative prices. And it is also further mutually agreed, that from each and every current estimate there shall be retained ten per cent. of the amount of such estimate, which ten per cent. is to be forfeited by the party of the first part to the party of the second part, in case the work is not fully completed by the time and in the manner herein provided for, and which is mutually agreed upon as liquidated damages for the non-performance by the party of the first part of any of the undertakings on his part herein contained. But, in case of the full completion of the said work by the party of the first part, then, and upon the final estimate therefor by the said chief engineer, the said party of the second part agrees to pay, within ten days, to the party of the first part, the full amount then due, including the reserve of ten per cent."

The contract included certain mason work at a place known as Broadhead Creek. Plaintiff's evidence showed that, during the progress of the work, the Construction Company, without the consent of plaintiff, made an arrangement with defendant by which the Broadhead Creek work was taken from the contract, and plaintiff was not permitted to perform the same. Plaintiff continued the work and completed it, save the portion so withdrawn.

The action was originally brought against the intestate during his lifetime, but on his decease after the first trial thereof, his administrators were substituted as defendants.

Byron v. Bell.

On the first trial, plaintiff recovered a judgment, which was reversed on appeal to the Court of Appeals, that court holding that the certificate of the chief engineer was a condition precedent to a recovery by plaintiff, and that his evidence did not show that he had ever demanded it from the chief engineer (see 109 N. Y. 291).

At the second trial, plaintiff testified positively (as referred to in the opinion at folios 168 to 172 of the case on appeal), that he had demanded the final estimate from the chief engineer before the bringing of the action, and had repeated such demand once a week for two months. Defendants then read the cross-examination of plaintiff on the former trial, wherein he had stated that he had made repeated inquiry of the chief engineer whether the estimates and measurements of the division engineers had been returned to the chief engineer, so that he could make the final estimate.

Defendants also read the testimony given by their intestate on the former trial, which, after a statement by him as to the whole estimate of the amount due plaintiff under his contract, and the amount which he had been paid, was as follows (as referred to in the opinion at folios 520, 521, 522 of the case on appeal): "*Question.* Now what was included in that whole estimate? *Answer.* Everything up to the time of this suit. Subsequently the statement by Mr. Truesdell to the chief engineer increased the N. J. Division \$2,046.83. *Question.* That is the statement that it has been said here was furnished to Mr. Wood some time in the month of March? *Answer.* Yes. It increased the amount, with Mr. Truesdell's estimate to Mr. Byron, of the N. J. Division—increased the amount that would apparently be due to Mr. Byron, \$2,046.83." And, continuing his answer, he proceeded to state at length numerous deductions which should be made from that amount, with computations of the several amounts and of the total of such deductions, and of the balance due to plaintiff. To all this part of the answer plaintiff objected, as not responsive, and the objection was sustained by the court and that part of the answer was stricken out.

Byron v. Bell.

The jury found a verdict for plaintiff for \$7,372.20. A motion by defendants for a new trial was denied and judgment for plaintiff was entered on the verdict. From the judgment and the order denying their motion for a new trial, defendants appealed.

W. J. Groo, for appellants.

L. Laflin Kellogg, for respondent.

LARREMORE, Ch. J.—This case has been once tried and appealed to the Court of Appeals. The report of it in that court (*Byron v. Low*, 109 N. Y. 291) contains a statement of the facts. The appellants claim that on this new trial the objection which led to the reversal before has not been obviated. But I am of opinion that the testimony of plaintiff at folios 168 to 172 inclusive makes out a *prima facie* case of a demand for the certificate from the chief engineer, as required by the contract. Plaintiff's direct testimony on the former trial on this point is not given, but we scarcely think appellants' contention, that it was substantially the same as on the present trial, can be correct. His former cross-examination, which was read on this trial, may all stand consistently enough with the direct evidence of a demand for the certificate itself which he has now given. There is other evidence from which the jury might have and did conclude that the certificate had been unreasonably refused. The case would, therefore, be analogous to the unwarrantable withholding by an architect from a contractor of a certificate of the completion of his contract. The contractor must, as a condition precedent to recovery at law, either produce the architect's certificate, or satisfactorily account for its absence. Similarly, in the case at bar, facts were shown from which the jury might infer that the engineer's certificate was kept back without just cause for an unreasonable length of time. Even under the decision of the court of last resort, therefore, we think the jury were authorized to find that the condition precedent had been complied with, and that plaintiff was not bound to wait longer before

Byron v. Bell.

proceeding to enforce his rights, especially in view of the fact that defendant was about to depart from the country.

Many of the exceptions to rulings upon the trial we do not deem of any serious consequence. The contract provided that the work should be executed and performed under the direction of the chief engineer or his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work performed should be determined. But certainly that could not preclude the testimony of other experts in a suit to enforce plaintiff's rights. We do not think the contract obliged plaintiff to submit to the chief engineer's decision and allowance without the right of appeal to the court, if the former claimed that he was fraudulently or unjustly dealt with. And if under any circumstances he was entitled to sue, it goes without saying he had the right to call witnesses, such as the assistant engineers Truesdell and Coons, to prove the nature, extent, and value of the work. This exception was not well taken.

Considerable evidence was excepted to because it was alleged to relate to transactions with the original defendant now deceased, but none of such exceptions seem valid. Many of the answers complained of do not as matter of fact relate either to "conversations" or "transactions" with the deceased, and such of them as may seem impliedly to do so come within the exception to the rule, made a part of the rule itself by section 829 of the Code. The testimony of the deceased defendant on the former trial was read on behalf of the defense here, and plaintiff, therefore, became entitled to give his version orally of the matters therein referred to.

The rulings as to the testimony of said deceased, excluding a considerable portion of it, seem from the printed record rather strict, but they were within the discretion of the trial judge. In the ruling especially complained of, at folios 520, 521, 522, much of the long answer was clearly irresponsive, as the court held, and, moreover, it contained conclusions and calculations.

Nevertheless, we are constrained to hold that the exclusion

Byron v. Bell.

of certain questions put to the witness Daniel H. Wood constituted error, which will require a reversal. The plaintiff had testified as to the amount and value of the work alleged to have been done by him under the contract, from a statement he had made, and the same was offered and received in evidence without objection as to that method of proof. (Exhibit J.) When Mr. Wood went on the stand this paper was shown to him, and he was asked to state what deductions should be made from the amounts. This question was objected to and excluded. The following question was also put, with a similar ruling:

“Q.—What proportion of the 365 51-100 yards of rip-rap wall that Byron has estimated at a dollar and a half a yard—what proportion of it should be at a dollar a yard?”

This question was put to Mr. Wood later on and excluded:

“Q.—From what you saw there on the ground at Indian Ladder Bluff; what amount of rock in your opinion was taken out outside of the slopes as provided for in the contract and specifications?” The contract provided that the plaintiff should be paid “for rock cut at Indian Ladder Bluff one dollar and twenty-five cents per cubic yard,” and a portion of the judgment rendered depends upon the jury’s estimate of how much of such work was actually cut. It must be remembered that the contract did not specify a gross sum for plaintiff’s compensation, but merely rates for different kinds of work; and, therefore, both from the very nature of the agreement, and because directly raised by the answer, the amounts and kinds of work actually performed were at issue. This witness, Mr. Wood, was not only the Chief Engineer of The New York & Scranton Construction Company, but by the contract itself he was “appointed a common arbiter, to whom all and every question of difference between the parties, growing out of this contract, shall be referred, and whose decision shall be final and binding upon both parties.” Certainly he was a competent expert upon all these matters upon which his testimony was excluded, and such testimony would have been very relevant for the defense. It was as seri-

Claffy v. O'Brien.

ous error not to allow him to testify as to the facts, as it would have been if the court 'under defendants' objections had rejected the evidence of the assistant engineers Truesdell and Coons. Defendants were in effect deprived of the evidence of their principal witness, on a most important branch of the controversy. I cannot discover that this error was in any manner cured; and there is no alternative but to order a new trial.

BOOKSTAVEN, J., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

JOHN CLAFFY Appellant, *against* JOHN O'BRIEN *et al.*,
Respondents.

(Decided June 2d, 1890.)

The answer in an action for goods sold and delivered was, in substance, a general denial, coupled with an admission that, between the dates mentioned in the complaint, certain goods were furnished defendants, but not to the value alleged. *Held*, that this did not admit the sale and delivery of the goods in controversy; especially as it appeared that, between the same dates, plaintiff had sold other goods to defendants.

Upon an objection urged by appellant to the exclusion, when offered in evidence by him, of a written contract between respondents and a third party, it appeared that the clause of the contract relied on by appellant was read in evidence, on the cross-examination of one of the respondents, and he was examined in regard thereto, and the facts were thus brought before the court and jury. *Held*, that the exclusion of the contract itself was not injurious to appellant.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered on the verdict of a jury and an order denying a motion for a new trial.

Claffy v. O'Brien.

The facts are stated in the opinion.

L. Laflin Kellogg, for appellant.

E. T. Lovatt, for respondents.

BOOKSTAVEN, J.—The complaint, after averring the copartnership of the defendants, contains the usual allegations in an action for goods sold and delivered. The answer, after admitting the copartnership of the defendants, is in substance a general denial, coupled with an admission that, between the dates mentioned in the complaint, certain goods were furnished the defendants, but not to the value of \$582.06.

The appellant contends that this was an admission that the goods in controversy were sold and delivered to the defendants. But in view of the fact that the plaintiff had, between the dates mentioned in the complaint, sold certain goods to the defendants which had been used by them on work done by them near Derby, Conn., while the goods sued for in this action were delivered in this city and used here by John Flanagan upon a wholly different work, we think the admission means no more than that the plaintiff furnished certain goods to the defendants, but not the goods in controversy.

As pointed out by the court below, the plaintiff did not construe the pleading into an admission of indebtedness for the goods referred to in the complaint, for he did not move for judgment on it, nor did he ask the trial judge to direct the jury that it contained an admission of liability for the debt.

On the trial it was therefore necessary for the plaintiff to prove that the goods had been purchased by the defendants or by their duly authorized agent and delivered to them or such agent, or, if no agency was proved, that the defendants, with a full knowledge of the facts, subsequently ratified the acts of one who was not their agent. The plaintiff did not claim that either of the defendants made the purchases in person, but endeavored to show that they were made by John Flanagan, who, he claimed, was defendants' superintendent

Claffy v. O'Brien.

and duly authorized agent to make the purchases. This the defendants denied; hence the question of agency became the vital one in the case, and under the general denial the defendants had the right to offer any competent evidence to disprove the agency (*Hier v. Grant*, 47 N. Y. 278; *Schaus v. Man. Gas Light Co.*, 86 N. Y. Super. Ct. [4 Jones & S.] 262.)

The evidence introduced by defendants tending to show that Flanagan was not at the time their superintendent, but a sub-contractor under them, and that he bought the goods on his own account, was admissible under the pleadings. No other objection was taken to it, and therefore no error was committed in allowing it.

Appellant also contends that, this evidence having been admitted, it was error to exclude the contract between defendants and the City of New York, under which they claimed they had made a subcontract with Flanagan, and which plaintiff denied. That contract contains these covenants; "And the said party of the second part [meaning defendants] hereby further agrees to give his personal attention constantly to the faithful performance of the work, and not to assign or sublet the work or any part thereof without the previous written consent of the Aqueduct Commissioners indorsed on this agreement, but will keep the same under his personal control;" and plaintiff insists that it was important to have these facts before the jury upon the probability of the defendants, in the face of such covenants as these, hazarding their rights in a large and valuable contract by violating these covenants. But the clause of the contract containing these covenants was read on the cross-examination of one of the defendants, and was in evidence, and he was examined in regard thereto; the defendants failed to prove any written consent as required by the terms of the covenants. The plaintiff therefore had these facts before the court and jury and was entitled to present any considerations or arguments that might be deduced from these facts as to the probability of defendants' contention, with the same force and effect as if

Coffey v. Lyons.

the contract itself had been offered in evidence, and we do not see how he was injured by its exclusion.

At the close of the case, the plaintiff made no request for a direction in his favor, and it went to the jury without objections. The trial judge clearly and concisely charged the jury upon the only questions involved in the case, and on the conflicting evidence they found in favor of the defendants, which conclusion we are not at liberty to disturb.

The judgment and order appealed from should therefore be affirmed, with costs.

LARREMORE, Ch. J., concurred.

Judgment and order affirmed, with costs.

THOMAS COFFEY Respondent, *against* JEREMIAH C. LYONS,
Appellant.

(Decided June 2d, 1890.)

In an action for work and materials, the answer denied that the work was done or the materials furnished at the time alleged in the complaint, and set up the statute of limitations. *Held*, that as the sale and delivery of the goods, and their value, as well as the value of the services rendered, were thereby admitted, permitting plaintiff, in testifying to the items thereof, to look at a bill which he had presented to defendant years before, and which he testified he had made within a month after the transaction, even if error, was not injurious to defendant.

The admission of such bill in evidence, against a general objection to it as incompetent, immaterial, and irrelevant, was not error, as the items were not disputed, and the date borne by the paper made it material, as bearing on the statute of limitations, to establish when the work was done; and it was competent for that purpose.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered on the verdict of a jury and an order denying a motion for a new trial.

Coffey v. Lyons.

The facts are stated in the opinion.

Doherty, Durnin, and Hendrick, for appellant.

Anson Beebe Stewart, for respondent.

BOOKSTAVEN, J.—The General Term of the City Court having passed upon the questions of fact, they are not reviewable by this court (*Bell v. Bartholomew*, 12 Weekly Dig. 33).

The complaint was for materials sold and delivered to defendant and for work done for him between January 1st and February 23d, 1884. The answer denies that the materials were furnished or the work done at the time alleged in the complaint, and also sets up the statute of limitations and pleads payment, thus admitting the sale and delivery of the goods and their value, as well as the value of the services rendered.

Notwithstanding these admissions, the plaintiff on the trial undertook to prove the items of his claim, but could not, without looking at a bill which he presented to the defendant years before. This was objected to by defendant on the ground that the paper was not the best evidence, not being a copy from the books, as he claimed. But plaintiff testified that it had been made within a month of the transaction. After looking at the paper, the witness testified to the items, apparently from recollection; at least the defendant did not object to the answer because he read from it. We think the case falls within the rules laid down in this court in *Howard v. McDonough* (8 Daly 365), affirmed by the Court of Appeals (77 N. Y. 592). But even if it did not, it could not have injured the defendant by any possibility, because the facts thus sought to be established had been already admitted by the defendant in his answer.

Subsequently the witness testified that the bill was in his handwriting and had been made about a month after the work had been finished, and that it was delivered to the

Darrah v. Boys.

defendant. But he did not testify as to its correctness, nor that it was a true copy from his books; nor did he testify that he could not remember the items after refreshing his recollection by looking at it. It was subsequently offered and received in evidence, under the general objection made by the defendant that it was incompetent, immaterial and irrelevant. This objection would have been good had the items contained in the bill been disputed, but, as before shown, they were not, and the only value of the paper as proof was the date which it bore. Plaintiff had sworn that the identical paper had been delivered to defendant years before, and it was certainly material as bearing on the statute of limitations to establish the date when the work was done, and we think was competent for that purpose and that only. There was therefore no error in admitting it in evidence in this case.

These being the only questions of law presented to us either by the brief or oral argument of counsel, the judgment should be affirmed, with costs.

LARREMORE, Ch. J., concurred.

Judgment affirmed, with costs.

JAMES N. DARRAH, Respondent, *against* JAMES BOYS, Appellant.

(Decided June 2d, 1890.)

Plaintiff, in an action for conversion of the proceeds of a note, testified that defendant, as broker, had sold the note for him, and received part of the proceeds in cash, which plaintiff had demanded, and defendant had refused to pay over. Defendant gave evidence tending to prove payment in full, and that he was plaintiff's banker, and had paid out the proceeds of the note on checks drawn by plaintiff; and also introduced in evidence a letter from plaintiff in which he spoke of keeping an account with defendant and leaving money on deposit with him. *Held*, that although this went far to corroborate defendant, there was no such preponderance of evidence as to authorize a reversal of a judgment on a verdict for plaintiff.

Darrah v. Boys. !

APPEAL from a judgment of this court entered on the verdict of a jury.

The facts are stated in the opinion.

John A. Deady, for appellant.

Carrington & Emerson, for respondent.

BOOKSTAVEN, J.—The defendant is, and at the time of his transactions with the plaintiff was, a broker and banker and a dealer in commercial paper. Before the acts complained of, the defendant had sold for the plaintiff a promissory note, receiving one half of the amount in cash and the other half in another note. On the 27th of June, 1888, plaintiff delivered to the defendant a note for \$4,567.12, which the latter was to sell on the same terms, and, as plaintiff claims, was to pay over the cash realized therefor, less the discount, to him, upon receiving it. Subsequently the defendant received \$1,200 cash on account of the note, and never received more, the difference being in some way settled between the plaintiff and the purchaser without defendant's intervention. Before the commencement of this action plaintiff demanded the cash received on this note of the defendant, which was refused. Thereupon this action was commenced for the conversion of the proceeds. The defense interposed was a denial of the conversion and payment. The answer also set up a counter-claim, which was stricken out on demurrer.

On the trial the plaintiff testified to his version of the transaction as above set forth, and the defendant gave evidence tending to prove payment in full, and also that the relation of banker and customer existed between the parties, and that the \$1,200 had been credited to the plaintiff on his account as such customer and paid out as directed by him. It was shown on the part of the defendant that plaintiff had drawn a number of checks on the defendant, but plaintiff claimed that these were drawn at defendant's request instead of paying cash, except in a few instances, when they were drawn for small amounts, and then the plaintiff arranged

Darrah v. Boys.

with the defendant for their payment when presented. The defendant also introduced in evidence a letter written by the plaintiff to him, in which he says "I told them (The Mount Morris Bank) I kept an account with you, so take care and give me a good send-off. I will see you in the morning and hope there will be no further delay about Clarke; I want to keep an account with you, and remember the more money we get from Clarke the more I can afford to leave on deposit with you." This, in our opinion, went far to corroborate defendant's theory, but this, together with the accounts tending to show payment and an actual indebtedness of the plaintiff to defendant, and all the other circumstances in the case, were fairly submitted to the jury, in a charge to which the defendant took no exception, and they rendered a verdict in favor of the plaintiff.

We have carefully examined the conflicting testimony in this case with the aid of the oral arguments and briefs of both parties, and while we might have arrived at a different result, we cannot say that the preponderance of evidence is so great as to authorize us to reverse the judgment on that account, in the absence of anything tending to show that there was a mistake on the part of the jury, or that they were influenced by bias, passion, prejudice, or corruption.

No other question being raised by the appeal in this case, the judgment should be affirmed, with costs.

LARREMORE, Ch. J., concurred.

Judgment affirmed, with costs.

Eagle Tube Co. v. Edward Barr Co.

THE EAGLE TUBE COMPANY, Appellant, *against* THE
EDWARD BARR COMPANY, Respondent.

(Decided June 2d, 1890.)

A boiler company, having contracted to deliver certain boilers at a fixed time, ordered of defendant tubes to be used in making the boilers, and plaintiff, with knowledge of the circumstances, contracted with defendant to weld heads on the tubes. Plaintiff "sweated" in the heads, instead of welding them, and defendant, in consequence, to prevent a breach of its contract, was compelled to deliver the boilers without the tubes, plugging up the holes in which the tubes were to be inserted, and to procure other tubes and insert them at such times as they could when the boilers were not in use. *Held*, that the extra expenses thereby incurred by defendant were the natural consequences of plaintiff's breach of contract, and were properly allowed as damages therefor.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered on the verdict of a jury and an order denying a motion for a new trial.

The facts are stated in the opinion.

Smith & White, for appellant.

Billings & Cardozo, for respondent.

BOOKSTAVEN, J.—The action was brought to recover the contract price of goods sold and delivered to the defendant amounting to \$106.25. The defendant admitted the indebtedness, and set up a counter-claim for \$600 damages arising, not out of the contract sued on, but on a former contract between the parties, whereby the plaintiff undertook to weld heads into about 540 pieces of iron pipe which had been ordered by the Vertical Tube Boiler Company of the defendant, and which the plaintiff delivered to that company with their heads sweated in and not welded in, and which were

Eagle Tube Co. v. Edward Barr Co.

on that account rejected by the Vertical Tube Company. Defendant's answer set up the agreement to weld in the heads, its breach, and a claim for the special damages sustained by it by reason thereof. To this plaintiff replied, admitting that it contracted to weld the heads into the pipe, but alleged that its contract only required them to stand a pressure of three hundred pounds, and that they not only stood this but much more.

On the trial evidence was given tending to support the issues so raised, and the jury found a verdict for the defendant for the amount of its counter-claim less the amount of plaintiff's claim in this action. The General Term of the City Court reviewed the questions of fact and affirmed the judgment, therefore we can only examine the questions of law in the case as presented to us.

There is but one question raised by the various exceptions to the introduction of evidence and to the charge, and that is, What is the true rule of damages to be applied to such a case?

Appellant contends that the defendant, if entitled to any damages, could at most only recover the value of the pipe if welded according to the contract, that is to say, the original cost, the expenses of transportation, and the amount the defendant paid the plaintiff for the welding.

In all ordinary cases of breach of an executed contract, the defendant could not recover even that much, unless the goods were totally spoiled for any purpose, as it is claimed these were.

But in this case the answer alleged the plaintiff was "fully informed as to the purpose for which the pipes were to be used," and charged it with knowledge of the necessary loss and damages which would occur in case the agreement was not carried out; and the court, at the plaintiff's request, charged the jury, that if the plaintiff was not informed for whom, and for what purpose, the pipes were needed, it was not responsible for any special damage suffered by the defendant resulting from the defective pipes, if they were defective,

Eagle Tube Co. v. Edward Barr Co.

thus sharply bringing home to the jury the question of plaintiff's knowledge of the use to which the pipes were to be put, and on the evidence the jury found that the plaintiff had such knowledge. To us it appears that the evidence on this question, on the part of the defendant, was very slight, and that on the part of the plaintiff was much stronger, but both the jury and the General Term of the City Court have determined otherwise, and we are concluded thereby, as there was some evidence to support the finding.

Where the parties to a contract of sale have such knowledge of special circumstances affecting the question of damages, as that it may be fairly inferred they contemplated a particular rule for estimating them, and entered into the contract on that basis, that rule will be adopted (*Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487).

The Vertical Tube Boiler Company was under contract to deliver certain boilers at a certain time. The tubes or pipes in question were ordered of the defendant to be used in making these boilers, and it contracted with plaintiff to weld in a head on the pipes furnished by it, with knowledge, as the jury has found, of the circumstances. This it failed to do, and in consequence of such failure the Vertical Tube Boiler Company had to deliver the boilers without them, in order to prevent a breach of contract on its part, and to do this, was put to the expense of plugging up the holes in which the tubes were to be inserted, and were compelled to procure other tubes and insert them in the boilers after they had been placed and at such times as they could when the boilers were not in use. Besides, they had to pay for extra carting, etc. These items constituted the claim made by that company against the defendant, and which the latter set up in its answer as a counter-claim against the plaintiff.

We think these extra expenses were the natural consequences of plaintiff's breach of contract, and were properly allowed. It was not necessary for the defendant to have actually paid in money the claim of the Vertical Tube Boiler Company, in order to set up and recover it against the plaintiff,

Eagle Tube Co. v. Edward Barr Co.

if it was just. It is enough that it is liable to pay it (Sedgwick on Damages, 7th ed. Vol. I. p. 197).

But defendant has practically paid it, as the Vertical Tube Boiler Company has claimed the amount allowed by the jury against defendant and refused to pay a bill due the defendant for a larger amount in consequence.

Plaintiff claims that, inasmuch as only about one-fourth of the tubes were tested, the counter-claim should not have been allowed, because the proof failed to show all would not stand the required pressure; but the contract, as claimed by the defendant and found by the jury, was that the tubes should not only stand the pressure but that the heads should be welded in, and the chief contention on this branch of the case was not so much about the pressure as about the welding in of the heads; and we think the testimony sufficient to warrant the jury in finding that they had not been welded but sweated in, as it is known in the trade, and that all had been subjected to the same process and were liable to the same infirmity as regards pressure.

The judgment should therefore be affirmed, with costs.

LARREMORE, Ch. J., concurred.

Judgment affirmed, with costs.*

* A motion for a reargument of the appeal, made at the November General Term, 1890, was denied December 1st, 1891.

Edel v. McCone.

CHARLES EDEL, Appellant, *against* ALEXANDER C. McCONE,
Respondent.

(Decided June 2d, 1890.)

After entry of a judgment in a district court by default, defendant moved to set it aside on the ground that the summons had not been served on him. *Held*, that plaintiff, having given the proof of personal service, on which the judgment was entered, was estopped to object to the jurisdiction of the justice to set aside the judgment, under section 1367 of the Consolidation Act (Laws 1882 c. 410), providing that a justice may, on motion, set aside any default made in any action tried before or by him; and that the inquest taken on such proof was a trial, within the meaning of that provision.

APPEAL from a judgment of the District Court in the City of New York for the Tenth Judicial District entered on the dismissal of the complaint.

The facts are stated in the opinion.

J. F. Meyer, for appellant.

W. F. Browne, for respondent.

PER CURIAM.—[Present, LARREMORE, Ch. J., and ALLEN and BOOKSTAYER, J. J.]—This action was commenced by the issuing of a summons November 27th, 1889, and, the defendant not being served, an alias was issued, and on the 13th of December, 1889, returned with proof of personal service. Defendant did not appear and plaintiff took judgment by default for \$52.50. On the 11th of January, 1890, the justice of that court, on the application of defendant, and on his affidavit setting forth that the summons had not been served upon him, granted an order to show cause why the judgment taken on the 13th of December should not be vacated and set aside. The only ground upon which the motion to vacate the judgment was made was that no summons or copy summons had ever been served upon the defendant. The motion

Edel v. McCone.

was heard by the justice on the 7th of February, 1890, plaintiff's counsel not putting in any affidavit and not controverting defendant's claim of no personal service of the summons, but opposing the motion on the ground that the court had no jurisdiction to vacate and set aside the judgment, as it had been entered by default and the court had never acquired jurisdiction. The justice granted the motion, vacated the judgment, and set the cause down for trial on February 14th, 1890; on which day both parties appeared by their counsel. Plaintiff's counsel refused to proceed with the trial on the ground that the court had no power to open the judgment for the reasons above set forth. Thereupon the justice, upon motion of defendant's counsel, dismissed the case with seven dollars costs. Hence this appeal.

By section 1367 of the Consolidation Act, it is provided that any justice may upon a motion made before him open and set aside any default made in any action tried before or by him. Appellant's counsel contends that this only applies to cases where he has actually acquired jurisdiction, and in this case he had not obtained such jurisdiction by reason of the non-service of the summons. But we think he is estopped from making this claim, because the justice only acted on the proof of the personal service of the summons upon defendant offered by plaintiff, and that the inquest taken upon such proof was a trial within the meaning of that section, and therefore the court had the power to open that default, and the defendant was not driven to the necessity of an appeal, although he had that remedy, nor to an action in equity to get rid of the judgment. Appellant also claims that, a transcript of the judgment having been filed, it was no longer a judgment of the district court. But the Court of Appeals has held that the filing of a transcript does not make it a judgment of this court for any other purpose than for its enforcement—that it remains a judgment of the district court.

The judgment of dismissal should therefore be affirmed, with costs.

Judgment affirmed, with costs.

Egan v. Berkshire Apartment Assoc'n.

DOMINICK J. EGAN, as Administrator of Winifred Egan,
Deceased, Plaintiff, *against* THE BERKSHIRE APARTMENT
ASSOCIATION, Defendant.

(Decided June 2d, 1890.)

Plaintiff's intestate, having gone to defendant's apartment house to visit a servant of one of the tenants, entered an elevator used for carrying baggage and servants, in one side of which was a slide, movable up and down, for the purpose of taking on baggage. While the elevator was ascending, the intestate, through faintness or loss of consciousness, sank to the floor, and, the slide being up, fell through it, and her dead body was found at the bottom of the shaft. The only negligence alleged on the part of defendant was in leaving the slide open. *Held*, that the facts would not authorize a finding of negligence, the accident being not only unexampled, but one which, if it had not happened, would have seemed physically impossible.

EXCEPTIONS taken at a trial term of this court, ordered to be heard in the first instance of the General Term.

The facts are stated in the opinion.

Goff & Pollock, for plaintiff.

Albert Stickney and Samuel H. Ordway, for defendant.

LARREMORE, Ch. J.—This action is to recover \$5,000 damages under the statute, for alleged negligence resulting in the death of plaintiff's intestate. The facts testified to by plaintiff's witnesses, and which must be taken as established for the purposes of this appeal, are as follows:

Plaintiff's intestate went to the Berkshire Apartment House to pay a friendly visit to a domestic servant in the employ of one of the tenants. She entered an elevator which was used for the carrying of baggage and freight, as well as for conveying servants employed in the house to the upper stories. The sides of this elevator were of wire, and in one side was a "slide," which was movable up and and down for

Egan v. Berkshire Apartment Assoc'n.

the purpose of taking on baggage. When said intestate stepped into the elevator, and when the accident happened, this slide was up. There also extended from the ground floor to a height of several feet, but not quite up to the second floor, a wire screen or "cage," of the same mesh and in all respects similar to the wire forming the elevator sides, the object of which was to protect persons from falling into the elevator shaft. Just under the ceiling of the first floor, and above where the wire "cage" stopped, and between it and the staircase, there was an open space by the side of the elevator shaft.

Plaintiff's principal witness gives this description of the accident. "I don't remember that I heard anybody else cry or shout or make any noise besides myself; I must have been pretty excited; I suppose the thing that first excited me was seeing her fall; all that I saw at the time the thing occurred, I saw her fall; I saw her fall inside under the slide; that is all I could see; she didn't fall exactly down, she fell more backward; towards the back of the elevator; and then I saw her fall outside at the side, underneath the slide that raised up and down."

A mysterious feature of the casualty is that, although the elevator fits quite closely in its shaft, there being only a space of a very few inches between the side of the shaft and the side of the elevator, the deceased did not fall on the staircase outside, but was found lying dead at the bottom of the shaft. The only possible explanation of the intestate's being able to get out of the elevator at all is, that when she fell, the open slide of the elevator was abreast of the opening in the shaft just under the second floor. Plaintiff's witness aforesaid caught at her clothing in an effort to save her, and apparently held on to her dress after she had got into the open space outside. Presumably this was the cause, while the elevator kept moving up, of the intestate's being drawn back within the elevator shaft. The evidence is undisputed that her remains were found at the bottom of such shaft.

Such facts as are shown convince me that the deceased

Egan v. Berkshire Apartment Assoc'n.

originally fell down inside the elevator through vertigo, fainting, or loss of consciousness. The reason attempted to be assigned on the trial for such fall is most improbable. The witness above referred to, Katie Egan, on this point said: "As far as I saw, the fur of her cloak caught in the outside wire and, as the elevator moved up, it drew her backwards." It seems impossible that fur of any quality or kind, even if it did catch upon or become entangled in a wire netting, could adhere thereto with sufficient tenacity to draw a woman backward off her feet, especially if another person grasped her clothing on the other side and helped her to pull back. A careful analysis of the evidence also shows that the witness virtually abandoned this theory as to the cause of the mishap. Upon her cross examination she admitted that she had previously testified at the coroner's inquest that "she [the deceased] stumbled some, and Tony said to her, 'Be careful, the slide is up;'" and further that she had said at the inquest "it was as if her dress was caught in the wire." One of the present counsel for appellant appeared at the inquest and put the question to the witness: "When you say she stumbled you mean she was pulled back by her dress?" to which she answered "No."

This testimony at the inquest was obviously very different, as to the probable cause of the accident, from that given by the witness on her direct examination in the present trial. Before the Coroner she not only neglected to say that the deceased was pulled back by her dress, but she directly refused to give that explanation, though it was suggested by a leading question. The witness further testified that the facts, as related by her at the inquest, a month or two after the accident, were as she remembered them then; that her recollection then was fully as good, and might be clearer, than at the time of the present trial; that she was no exception to the rule that persons remember events better when they are fresh than when they are two or three years old. The only fair construction of her evidence as a whole is, that whenever her testimony at the trial conflicted with that at the inquest, she

Egan v. Berkshire Apartment Assoc'n.

intended that the latter should prevail, and she was to be considered as now testifying to the facts as she had formerly stated them.

Accepting this view, the theory that the decedent was pulled out of the elevator, by the catching and adhering of the fur on her cloak to the wire cage, is left without foundation; in fact the only possible hypothesis the admitted facts will support is that, either through faintness or loss of consciousness, she "stumbled" and sank to the floor of the elevator while it was ascending. It is in evidence that she had been sick a few weeks before this time, and also that she did not utter a cry or any sound when she fell. Having fallen thus, in some inexplicable manner, perhaps by the momentum from the fall, she rolled out through the slide into the opening in the shaft, and, being dragged back through Miss Egan's mistaken zeal in holding fast to her dress, fell to the bottom.

The only alleged act of negligence on the part of defendant was in leaving the slide open. Even if the elevator had been constructed without a slide, but with a permanent opening in the side, I should not have considered such form of construction in itself sufficient to make out a *prima facie* case of negligence. The accident was not only unexampled; it was one which, if it had not actually happened, would seem physically impossible. We think the trial judge correctly held that plaintiff's case disclosed no facts which would authorize a finding of negligence, and correctly ruled in dismissing the complaint at that stage.

The following language of ANDREWS, J. in *Loftus v. Union Ferry Co.* (84 N. Y. 455), forcibly states the legal principles which we conceive are applicable to the present case: "The law does not impose upon the defendant the duty of so providing for the safety of passengers that they shall encounter no possible danger, and meet with no casualty in the use of appliances provided by it. It was possible for the defendant so to have constructed the guard that such an accident as this could not have happened, and this, so far as appears, could have been done without unreasonable expense or trouble. If

Egan v. Berkshire Apartment Assoc'n.

the defendant ought to have foreseen that such an accident might happen, or such an accident could have reasonably been anticipated, the omission to provide against it would be actionable negligence. But the facts rebut any inference of negligence on this ground. The company had the experience of years certifying to the sufficiency of the guard. That it was possible for a child, even a man, to get through the opening, was apparent enough. But that this was likely to occur was negatived by the fact that multitudes of persons had passed over the bridge without the occurrence of such a casualty."

Again, in *Lafflin v. Buffalo & South Western R. R. Co.* (106 N. Y. 136), Judge EARL remarks that: "No structure is ever so made that it may not be made safer. But, as a general rule, when an appliance or machine or structure, not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe, and convenient, its use may be continued without the imputation of culpable imprudence or carelessness."

We think the motion for a new trial should be denied, and that judgment should be entered for defendant; and we could not better sum up the reasons for our conclusion, than by employing the final words of Judge EARL's opinion in the case last cited: "A careful consideration, therefore, of the whole case as it appears in this record, has led us to the conclusion that the defendant is not legally responsible for the accident which befell the plaintiff. It was a misadventure, and no rule of law will permit her to charge the misfortune, in whole or in part, to the defendant."

BOOKSTAVEN, J., concurred.

Exceptions overruled.

Flanagan v. Mitchell.

**RICHARD FLANAGAN, Respondent, *against* PETER MITCHELL
et al., Appellants.**

(Decided June 2d, 1890.)

An order on defendants for the payment of a sum of money was accepted by them by writing thereon "Accepted, payable out of" a specified payment. *Held*, that this was a conditional acceptance, which became absolute when they received the payment referred to.

In an action by the payee of such order against the acceptors, the former testified that he took the order in payment for work done on a certain building, on defendants' promise to accept it, if he would not file a lien on the building, and that in reliance thereon he forbore to file a lien. *Held*, that such forbearance was a sufficient consideration to bind defendants, although they received nothing for their acceptance.

A written contract between third parties, offered in evidence by defendants, was excluded, but one of the defendants in testifying was allowed to refer to and refresh his memory from it, and plaintiff subsequently withdrew all objections to its admission and an opportunity to introduce it in evidence was given defendants, which they refused. *Held*, that any error in originally excluding it was cured.

APPEAL from a judgment of this court entered on the verdict of a jury and from an order denying a motion for a new trial.

The facts are stated in the opinion.

Chauncey S. Truax, for appellants.

Thomas C. Ennever, for respondent.

LARREMORE, Ch. J.—The plaintiff is a plasterer by trade, and prior to September 4th, 1886, was engaged in plastering a row of buildings, in Seventy-first Street, near West End Avenue, under a subcontract with Messrs. Fonner & Lowther, the builders. It is undisputed that upon said day the following instrument was executed by said builders, delivered to the plaintiff, and accepted as therein stated by the defendants:

Flanagan v. Mitchell.

"September 4th, 1886.

"Gentlemen,

Please pay to Richard Flanagan the sum of \$500, and charge the same to our account and oblige,

Very Resp't.

FONNER & LOWTHER."

"To P. & D. Mitchell.

"Accepted payable out of standing trim payment.

P. & D. MITCHELL,

Attorneys for loan."

This action is to enforce payment of such instrument.

The learned trial judge correctly instructed the jury that the words "Attorneys for loan" were mere surplusage, to be disregarded, and, further, that the instrument was not to be taken as an ordinary bill of exchange absolutely accepted, but that defendants' action in the premises constituted a conditional acceptance. The obligation thereunder consequently could not become absolute until the condition therein named was fulfilled. It appears, however, that the complaint contains an allegation that there came into the hands and possession of defendants a sum exceeding five hundred dollars on account of said standing trim payment, and that they retained and kept the amount from the said Fonner and Lowther on account of the order or draft above mentioned. This allegation is not denied or referred to in the answer, and must therefore be taken as admitted for the purposes of the trial. This is of course the strict legal effect of allowing an allegation to go undenied in the pleading, and furthermore, it hardly seems that the omission could have resulted from inadvertence, because the defendant who testified on the trial on this subject would only say that the standing trim payment was never due, and that he did not think it was made as a matter of fact. This witness further states the conclusion of law that money never was advanced to Fonner & Lowther that ought to have gone to Mr. Flanagan, and adds that the money that Fonner & Lowther got after all these liens and judgments were put on was a matter of grace. The question

Flanagan v. Mitchell.

attempted to be raised in such evidence with regard to the falling due of the standing trim payment relates to the construction of the building loan contract to Fonner & Lowther. We should be obliged to hold the defendants to their admission in the answer under any circumstances, and a perusal of Mr. Mitchell's testimony convinces us that no actual injustice results from the application of such technical rule.

But, although the condition of the acceptance must be held to have been fulfilled, the appellants further argue that there was no consideration to support the obligation undertaken by the Messrs. Mitchell. One ground of error assigned is, the exclusion of the question to one of the defendants—"Did you ever receive any consideration, or did you, as attorneys for the parties making the loan, receive any consideration for this acceptance?" We think this question was immaterial. As between these parties it was not of the slightest consequence whether the defendants gained any advantage for the obligation they incurred. The real consideration here was forbearance on the part of the plaintiff. He testifies that before the draft was signed there was a request made upon Mr. Mitchell to pay him money. "Mr. Mitchell said he did not owe them money just then; that he could not advance me [him] any money, because there was not enough security for the same. Then I said 'Mr. Mitchell, I will have to put a lien on the job if you don't.' He said: 'No, I would not do that. . . . If they give you an order I will accept the order on the standing trim payment.'" Plaintiff's theory of this action is that, relying on Mr. Mitchell's acceptance, he did not take immediate steps to secure himself by a lien. This is certainly ample consideration in law to hold the defendants, and the question whether or not they received anything by way of indemnity or direct profit for their acceptance would be collateral to the issues of the present case.

The defense was also raised that the amount of this draft was intended to be merged into a mortgage subsequently given by the builders to the plaintiff. Plaintiff on his part denied that the amount of said draft was included in said

Flanagan v. Mitchell.

mortgage and that it never was intended that the same should be extinguished. The evidence was conflicting on this point, and the question was fairly submitted to the jury, and their verdict in plaintiff's favor must stand. The answer does not allege whether a bond or note or any other instrument accompanied the mortgage. Even if this mortgage had been given as collateral security for the draft and other indebtednesses, said draft, and the right to sue upon it independently, would not have been extinguished.

Counsel for appellant contends that the exclusion of the contract between Andrew J. Skinner and Sarah E. Lowther and James S. Fonner was error, necessitating a reversal. But this contention cannot prevail. The defendant referred to such contract and refreshed his memory from it in giving his evidence; and subsequently counsel for plaintiff withdrew all objection and the defendants were given an opportunity of introducing such contract in evidence at a later stage in the case if they so desired. This offer they then refused, and we think that any error that might have existed by reason of the original exclusion was thereby cured.

The judgment appealed from should be affirmed, with costs.

BOOKSTAVEN, J., concurred.

Judgment affirmed, with costs.

Gallagher v. Reilly.

**PATRICK GALLAGHER, Appellant, *against* CHARLES REILLY,
Respondent.**

(Decided June 2d, 1890.)

In summary proceedings against a tenant from month to month, for recovery of possession of the demised premises, a final order was made awarding possession to the landlord, and thereupon, without the issue of a warrant, the tenant removed from and surrendered the premises. *Held*, that the tenancy was terminated, and the landlord could not recover rent for the ensuing month. The provision of section 2258 of the Code of Civil Procedure, that the issuing of the warrant cancels the agreement and annuls the relation of landlord and tenant, is not to be restricted in its application where the issue of the warrant is not necessary.

APPEAL from a judgment of the District Court in the City of New York for the Ninth Judicial District.

The facts are stated in the opinion.

E. T. Rice, for appellant.

J. Vincent, for respondent.

LARREMORE, Ch. J.—This was an action to recover for one month's rent of the house No. 81 East 116th Street. According to plaintiff's testimony it was an oral hiring for eighteen months from October, 1888. A written lease was prepared, but was not shown to defendant until he demanded it, when he objected to the proposed lease and it was not executed. Subsequently a dispute arose between the plaintiff and defendant as to the amount then due.

The action might have been maintained for the rent, but the plaintiff caused a precept to be issued and served upon defendant, requiring him "forthwith to remove from the premises or show cause [before the court below], May 21st, 1889, why possession of said premises should not be delivered to the plaintiff."

Gallagher v. Reilly.

An answer was filed to the petition, and the cause was set down for trial. The defendant afterwards withdrew his answer, and thereupon a final order was made awarding to petitioner possession of the property in question. The defendant, without waiting for the issuance of a warrant, moved from the premises May 27th, and sent the keys of the house to the plaintiff.

The court below held the plaintiff could not recover rent for the month of June, and under all the circumstances of the case I think such adjudication was correct. The hiring of the premises, under the authority of *Prial v. Entwisle* (10 Daly 398), was from month to month (*Thomas v. Nelson*, 69 N. Y. 121).

After the final order of the justice awarding possession of the premises to the plaintiff in the summary proceeding, it was the plaintiff's duty and right to surrender the premises and not to wait until dispossessed by warrant (*McAdam Landlord & T.* 2nd ed. 653; *People v. Kelsey*, 14 Abb. Pr. 378). Such final order, which was in effect a judgment, may be satisfied by compliance with its requirements on the part of the tenant, as well as by the issuing of a warrant, and cancels the agreement between the parties. Section 2253 of the Code should not be restricted in its application. The lease may be cancelled by the agreement of the parties or by surrender of the premises when required to do so by order of the court.

I think it a fair interpretation of the statute that when it becomes necessary to issue a warrant for the removal of a tenant, then the issuance of such warrant cancels the agreement. If while the warrant was unexecuted the tenant had remained in possession, a different state of facts would have been presented (*Powers v. Carpenter*, 15 Weekly Dig. 155; *Dean v. Ritch*, 13 Daly 62).

As the defendant surrendered the premises under the final order, the landlord thus secured the precise remedy which he sought when he procured and served the precept. In such a case, the issuance of a warrant was unnecessary and useless,

Goeghegan v. Atlas Steamship Co.

for the plaintiff had obtained all that he sought in the summary proceedings. It appears that the tenant has already left. The landlord was entitled to full possession of his premises. To issue a warrant in such a case, as before stated, would be useless and a nullity, inasmuch as it would be the enforcement of an order which had already been complied with.

The judgment of the court below should be affirmed, with costs.

BOOKSTAVEN, J., concurred.

Judgment affirmed, with costs.

SUSAN GEOGHEGAN, as Administratrix of John M. Geoghegan, Deceased, Appellant, *against* THE ATLAS STEAMSHIP COMPANY, Respondent.

(Decided June 2d, 1890.)

A commission should not be granted to take testimony of lawyers of a foreign country to prove a statute of that country, and its interpretation, where it is not shown that there is any ambiguity or uncertainty in its meaning, or that it has received any judicial interpretation there, or that it cannot be proved, under section 942 of the Code of Civil Procedure, by an officially printed copy.

Evidence by lawyers of a foreign country, as to the opinion of lawyers there on the construction of a statute of that country, is not admissible where the language of the statute is plain and there is no decision by the courts of such country upon the point in controversy.

APPEAL from an order of this court denying a motion for a commission to take testimony.

The facts are stated in the opinions.

Roger M. Sherman, for appellant.

Wheeler, Cortis, & Godkin, for respondent.

Goeghegan v. Atlas Steamship Co.

LARREMORE, Ch. J.—This is an appeal from an order denying an application, made by plaintiff, for a commission to take the testimony of two advocates in active legal practice in the Republic of Colombia, as experts. It was conceded on the argument that the object of such examination was to prove a certain statute law, alleged to have been in operation in the United States of Colombia (which government has since been merged into the present Republic of Colombia), and the interpretations of such statute made and accepted by the courts of such foreign country.

Section 942 of the Code provides a simple manner of proving foreign statutes by officially printed copies. The learned counsel for appellant argues that the law does not restrict him to such form of proof, and further contends that he should not be so limited, because there is nothing to show that printed copies of the law in force when the accident occurred exist. Undoubtedly, the learned judge did in effect presume that printed copies were obtainable, but we think it was not error for him to entertain such presumption, under the circumstances disclosed, in a matter addressed to his discretion. Section 888 is not mandatory, but the discretion granted by it is to be exercised with the greatest latitude and always in the interests of substantial justice. Nevertheless, the judge was not precluded from considering that, in the present state of civilization, most governments officially print their statutes, and from supposing such to be the fact here, as there was no allegation in the papers, or suggestion on the argument, to the contrary. On the basis that the proof could be made under section 942, we think it was a proper exercise of discretion not to put the parties to the trouble and expense of any other form of procedure.

On the question of the alleged interpretation of the statute by the courts of Colombia, we think the rule well settled that the evidence of the proposed witnesses would be incompetent if obtained (*Molson's Bank v. Boardman*, 47 Hun 142, and cases there cited). It would have been an unwise exercise of discretion to grant plaintiff a commission to take evidence,

Goeghegan v. Atlas Steamship Co.

which, on her own showing, would certainly have been inadmissible.

The order should be affirmed, with costs.

BOOKSTAVEN, J.—The action in which the motion was made is brought to recover damages from the defendant for the alleged death of plaintiff's intestate, caused as it is claimed by the negligence of defendant in the harbor of Savanilla, Republic of Colombia. The learned judge who heard the motion says in his opinion it was conceded on the argument by plaintiff's counsel that the sole object of the proposed commission was to secure proof of a certain statute law of the Republic of Colombia and its interpretation in that country. No other ground for the motion is suggested by the moving papers. They do not show that there is any ambiguity or uncertainty in the meaning of the law, or that it has received any judicial interpretation in that republic, or that it cannot be proved under section 942 of our Code. We think the latter fact at least must be made to appear before the court would be authorized to grant the commission.

It has been held that the statute law of another state cannot be proved by parol (*Toulandou v. Lachenmeyer*, 6 Abb. Pr. N. S. 215; *Kenny v. Clarkson*, 1 Johns. 385).

But if the object of the commission had been stated in the papers to be to prove the construction and interpretation of this foreign statute, the opinion of the persons sought to be examined would not be admissible to prove it.

Where the evidence of a foreign law consists entirely of a written document, statute or judicial opinion, the question of its construction and effect is for the court to determine, and evidence of a lawyer of another state or country as to what, in the opinion of lawyers there, should be the construction of a statute of that state or country, is not admissible where the language of the statute is plain and there is no decision by the courts of that state or country upon the points in controversy (*Molsons' Bank v. Boardman*, 47 Hun 142; *Kline v. Baker*, 99 Mass. 255; *Shoe & Leather Bank v. Wood*, 142

Johnson v. Bindseil.

Mass. 564; *Hennessey v. Farrely*, 13 Daly 468; *Dupuy v. Wurtz*, 53 N. Y. 571).

The motion was therefore properly denied, and the order appealed from should be affirmed, with costs.

Order affirmed, with costs.

MOSES JOHNSON, Appellant, *against* HERMAN F. BINDSEIL,
Respondent.

(Decided June 2d, 1890.)

Under an agreement to render services to another as long as they are satisfactory to him, so long as the employe performs services for the employer, he is entitled to be paid therefor; but if he or his work is not satisfactory to the employer, the latter may at any time discharge him without subjecting himself to further claim.

MOTION for re-argument or for leave to appeal to the Court of Appeals.

The facts are stated in the opinion and in the report of the decision on the hearing of the appeal (see 15 Daly 492).

A. Kahn, for appellant.

M. Stuyvesant, for respondent.

PER CURIAM.—[Present, LARREMORE, Ch. J., and ALLEN and BOOKSTAVEN, JJ.]—This case was decided at the January General Term of this court, and the judgment affirmed. The plaintiff's counsel now claims that, on the argument of this case, *Doll v. Noble* (116 N. Y. 231), was not then reported, and consequently was not brought to the attention of the court, and that that case is decisive of the questions involved in this. We think not, for in this case the contract was as follows:

Johnson v. Bindseil.

“New York, Jan. 8, 1889.

“I, Moses Johnson, agree to teach Herman F. Bindseil, the art of drafting patterns by scale, and in every particular and branch of said art, lessons to be given 2½ hours each evening in the week (Sundays excepted) until said Herman F. Bindseil has acquired full knowledge of the art, for which I, Moses Johnson, am to receive payments as follows, viz.: Tuesday, Jan. 8, 1889, being the first evening's instruction, \$25.00, and if the foregoing lessons are satisfactory to Herman F. Bindseil I am to receive on Monday, Jan. 14, 1889, \$25.00, the same amount on Monday, Jan. 21, 1889, if all is satisfactory, and a final payment of \$25.00 when Mr. Herman F. Bindseil is satisfied.”

This contract evidently contemplates the giving of the lessons for four weeks if necessary, and at least until defendant had acquired full knowledge of the art to be taught, provided the defendant was satisfied with the manner in which the plaintiff performed the services to be rendered by him.

The first and second payments were made, and suit was brought to recover the third and fourth instalments. On the trial plaintiff admitted that the instructions were continued for ten evenings only; and from the evidence it appears that they were then discontinued, not because of any act of the defendant, but by reason of plaintiff's confinement at Mount Sinai Hospital on account of illness, and that he never thereafter offered to give further instructions. Defendant on the trial claimed that, by reason of such failure, the instructions which had already been given were useless to him, as he had not at the time acquired full knowledge of the art to be learned, and therefore could not use with advantage the instructions already imparted; he also claimed that he had not acquired proficiency in the art. The justice had a right to rely upon this testimony, and was justified in coming to the conclusion that he did. *Doll v. Noble* (116 N. Y. 231), announced no new doctrine, but merely reaffirmed an old one and applied it to the facts in that case, which related to an executed contract. Substantially the same rule had been

Johnson v. Bindsell.

announced and applied in *Smith v. Brady* (17 N. Y. 176); *Thomas v. Fleury* (26 N. Y. 26); *Wyckoff v. Meyers* (44 N. Y. 145); *Nolan v. Whitney* (88 N. Y. 648); *United States v. Robeson* (9 Pet. 328); *Smith v. Wright* (4 Hun 652); *Whiteman v. Mayor* (21 Hun 121); cases of executed contracts, in which a certificate was refused in bad faith or unreasonably by the party who was to give it, or the refusal to pay was an arbitrary act after work performed. Of course such a rule applies with greater force where work is to be done to the satisfaction of the party himself and where it has been done, than where the certificate of a third party is necessary. The satisfaction required in such case must be reasonable. The party for whom the work has been done cannot defeat a just claim for payment of work done by arbitrarily and unreasonably saying that he is not satisfied.

But the rule is different where a person is to work for another or perform services for another so long as such work or services prove satisfactory to the employer. In such case, so long as the employe performs services for the employer, he must be paid for it; but if he or his work is not satisfactory to his employer, he may at any time discharge him without subjecting himself to further claim, and in such case the employe loses nothing, for the reason that he has performed no services, and has entered into a contract in which there is an implied condition that it may be discontinued at any time whenever the employer becomes dissatisfied with him or his work. And this, we think, was the doctrine which was intended to be announced in the opinion given in this case on the former argument, although some of the expressions therein contained may leave it in doubt whether it was intended to apply to an executory contract only, or to an executed contract as well.

The motion for a re-argument or for leave to go to the Court of Appeals should therefore be denied.

Motion denied.

Koehler v. Scheider.

BERTHA KOEHLER, as Executrix of **Hermann Koehler**, Deceased, Appellant, *against* **JOSEPH SCHEIDER**, Respondent.

(Decided June 2d, 1890.)

The provision of section 830 of the Code of Civil Procedure that, where a party has died since the trial of an action, his testimony at "the former trial" may be given in evidence at a new trial, applies to testimony at any former trial, and not merely that taken at the last preceding trial, where there have been more than one.

Notice by a landlord to a tenant to vacate the demised premises, "on or before" the day on which the tenancy expires, is not a continuing offer to accept a surrender by the tenant at any time before that day.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered on the verdict of a jury and an order denying a motion for a new trial.

The action was brought for rent, for the months of March and April, 1886, of premises let for a year from May 1st, 1885. The answer set up a constructive eviction as a defense. A judgment of the City Court for plaintiff entered on a verdict directed by the court was reversed on appeal to this court, and a new trial ordered (See 15 Daly 198). At such new trial, the jury found a verdict for defendant. A motion by plaintiff for a new trial was denied and judgment for plaintiff was entered on the verdict. From the judgment and the order denying her motion for a new trial, plaintiff appealed to the General Term of the City Court, which affirmed the judgment and order; and from that decision plaintiff appealed to this court.

Charles P. Daly and E. J. Myers, for appellant.

George H. Yeaman and Maurice Rapp, for respondent.

Koehler v. Schelder.

LARREMORE, Ch. J.—There have already been so many trials of this case that it is to be regretted that the judgment must be again reversed. I think there was sufficient to go to the jury on the question of constructive eviction. I am also of opinion that it was not error to allow the testimony of plaintiff's testator, given on the first trial of this action, to be read in evidence on the present trial. The contention of appellant seems to be that section 830 of the Code would allow only such testimony as was taken upon the trial immediately preceding this one; but I think the language of the section sufficiently broad to take in any former trial where evidence was given by a party since deceased which it is subsequently desired to use. There is nothing to show that such was not the intention of the legislature, and the opposite party always has the compensating privilege, granted by section 829, of being himself examined orally as to any matters referred to in the testimony so read.

But the trial judge fell into one very grave error in his charge. It appears that, on or about the 1st day of February, 1886, the landlord, being plaintiff's said testator, sent the following note to defendant dated that day:

“Dear Sir:

“I hereby beg to inform you that I desire you to vacate the premises on First Avenue which you now rent from me, on or before April 30th, 1886.”

The trial judge told the jury that they might read this letter in connection with the following one of March 1st, 1886, from the defendant:

“Mr. H. Koehler.

“Dear Sir:

“We hereby surrender you the keys of premises occupied by us and give you full possession. The premises being untenable is the cause of our removal.”

The instruction to the jury was, in effect, that the aforesaid

Koehler v. Scheider.

letter from the landlord was a continuing offer from the time of its transmission, to accept a surrender of the existing lease whenever the defendant chose to make it; that the letter from the defendant might be construed to operate as such surrender; and that the lease, therefore, came to an end on March 1st. We think this was a misconstruction of the landlord's words. Some such communication from him was necessary at some time before the termination of the original lease, because otherwise, said lease being a verbal one for one year, a new demise for a second year would arise by operation of law if defendant elected to remain. In the exercise of common sense, as well as good legal judgment, this is the only interpretation that could be put upon the landlord's letter. Upon a former trial of this action one of the judges of the court below has construed this letter as follows:

“Where a landlord gives his tenant a notice to move on or before April 30th, that means he is not to move after April 30th, that he is to move on the termination of the tenancy, the liberty to move sooner being a liberty the tenant has. A landlord may give a tenant notice to move on or before the 1st of May, his lease being up to the 1st of May; but that does not mean that if a tenant should move out the next day, he should pay no rent. It means that the landlord will insist upon his legal right to have him move out before the last day of the term. ‘On or before’ is common language of the law, meaning that if you remain one day after, you remain at your peril, you are a trespasser, a wrong-doer. A landlord can take nothing away from a tenant's rights, and waives nothing by serving a notice of that kind.”

This view is eminently sound, and it was grave error to submit any different one to the jury. They were allowed to find a verdict either on the ground of eviction, or of alleged surrender of the lease brought about by this correspondence. Of course we cannot say upon which ground their finding was based, and the judgment must be reversed and a new trial ordered, with costs to abide the event.

Koehler v. Schelder.

BOOKSTAVEN, J.—As was said by us when this case was before us on a former appeal, “what would justify a tenant in vacating the premises” hired by him, for a constructive eviction, “depends so much on the terms of the lease” and various other conditions in that opinion set forth, that any discussion of it at that time would be premature, as the testimony on the new trial might change the aspect of the case. I still deem it premature to discuss that question at this time or to express any opinion on that evidence presented to us now. The question is a very close one and can be satisfactorily decided only when all the facts are before the court to be determined after a trial free from error in other respects.

The plaintiff having died before the last trial of this action, and the defendant having become incompetent, under section 829 of the Code, to testify to any personal transaction between himself and the deceased, he availed himself of the right given by section 830 of the Code to read his evidence given on both the former trials of this action, subject to legal objection, etc., as provided in section 830. The plaintiff objected to the reading of the testimony given on the first trial, contending that the section confined the defendant to reading the evidence given by him on the last preceding trial, and did not permit the reading of that given on the first trial. I agree with the learned Chief Judge that no error was committed in allowing both to be read. The appellant's contention is based upon the language used in the section, which permits the party rendered incompetent to read his evidence “taken or read at the former trial,” insisting that it means the last trial only, if there be more than one. This construction, if correct, would confine the reading of such testimony to the first trial only, following the death of the other party, for the language permitting such reading is “At a new trial or hearing,” and not any new trial, if more than one should be required, which would defeat the object of the section in case there were two trials following the death of a party. I think the intention of the section was to give competency to any testimony of the witness given in the case between the same parties before.

Koehler v. Scheider.

the incompetency attached to him. The then plaintiff, against whose executrix it is now offered, had the same opportunity, and certainly as great an interest as his executrix can have, to resort to every test to probe the witness and his evidence. The same reasons which render it proper to allow the testimony given on the last trial preceding the plaintiff's death operate to allow the reading of the testimony given on the first trial, as far as the same is pertinent to the contest. I therefore think the section was intended to permit the reading of any testimony given under such circumstances, whether on the last or any preceding trial of the action.

The question read from the former examination of the witness, in which he was asked to state what the deceased had agreed to furnish and what he had agreed to do, is, I think, fatal. It clearly called for the conclusion of the witness merely, and not for what took place or was said between the parties. The learned judge who presided at that trial first excluded the question, on plaintiff's objection that it merely called for a conclusion, and when shortly afterwards it was repeated allowed it, and the answer shows that he gave his conclusions only, and not what was said or done. It was sufficient for the plaintiff to object as he did on the grounds before stated by him, and it was not necessary to repeat those grounds; the court's attention had been specifically called to them (*Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256, 260).

The testimony given at the former trial is allowed to be read subject to any legal objection to the testimony, or to any question put to the witness.

I agree with the learned Chief Judge, for the reasons assigned by him, that it was error to charge as was done in regard to the letters of February 1st, 1886, and March 1st, 1886.

For these reasons the judgment must be reversed and a new trial ordered, with costs to abide the event.

Judgment reversed and new trial ordered, with costs to abide event.

Lewis v. Flack.

CHARLES LEWIS *et al.*, Appellants, *against* JAMES A. FLACK,
Sheriff of the City and County of New York, Respondent.

(Decided June 2d, 1890.)

Where a sale of goods has been procured by false and fraudulent representations of the purchaser, the seller may recover them, on proof of the fraud, from a sheriff who has levied on them as the property of the purchaser.

APPEAL from a judgment of the District Court in the City of New York for the Eleventh Judicial District.

The facts are stated in the opinion.

Nathan Lewis, for appellants.

David Tim, for respondent.

PER CURIAM.—[Present, LARREMORE, Ch. J., and ALLEN and BOOKSTAVEN, JJ.]—This action was brought to recover the possession of certain property fraudulently obtained from plaintiffs by the vendee and levied on by the defendant as sheriff.

The sheriff was not a purchaser for value, and where a sale of goods has been induced by false and fraudulent representations on the part of the vendee, the vendor may reclaim and retake them from the possession of any one but a purchaser in good faith for value; and evidence of the false and fraudulent representations inducing the sale is admissible in an action brought against the sheriff to the same extent that it would be against the original vendee (*Guckenheimer v. Angevine*, 81 N. Y. 394; *Stevens v. Brennan*, 79 N. Y. 254; *Hathorne v. Hodges*, 28 N. Y. 486).

It was therefore error to exclude evidence of the representations made by the vendee at the time of the purchase, the falsity of these representations, and the fact that the

McGrane v. Kennedy.

representations were relied on in making the sale, and, generally, evidence tending to show the fraudulent intent of the vendee in making the purchase.

Besides, the defendant did not show that he detained the goods under any process of court, and the jury were erroneously directed to find a verdict for the defendant.

The judgment must therefore be reversed and a new trial ordered, with costs to the appellant to abide the event.

Judgment reversed, with costs to abide event.

SARAH A. McGRANE, Plaintiff, *against* JAMES KENNEDY
et al., Defendants.

(Decided June 2d, 1890.)

Plaintiff contracted to sell to defendants certain real property situated on Thirty-eighth Street in the City of New York, of which one N. had been the owner, at the date of his will and at the time of his death, and to which plaintiff claimed title under a clause in the will of N., by which he devised to his wife "all the right, title, and interest I possess in and to certain lots in Thirty-seventh Street in the City of New York, which I acquired from Chatfield H. Smith." On a submission upon agreed facts of the question whether defendants should be compelled to specifically perform the contract on their part, it was admitted that no conveyance to N. of any premises on Thirty-seventh Street appeared of record, and that one Chatfield H. Smith, in proceedings for probate of N.'s will, testified that he conveyed to N. certain real property on Thirty-eighth Street; that he never sold N. any other real property; and that he knew of no other person bearing his name in New York City. *Held*, that as the truth of this testimony was not conceded by the admission, and as it was not conclusive as against the heirs of N., plaintiff's title was not so free from doubt as to justify a direction that defendants should accept it.

CASE submitted on statement of facts agreed upon without action.

The facts are stated in the opinion.

John Hardy, for plaintiff.

McGrane v. Kennedy.

Page 8 Taft, for defendants.

BISCHOFF, J.—A careful examination of the case agreed upon and submitted by the parties to this action shows that one James Nelson, at the date of his last will and testament, April 25th, 1856, and at the time of his death, March 28th, 1857, was the owner of certain real property, situated on West Thirty-eighth street in the City of New York, being the same premises described in the contract of sale forming a part of the case submitted; that the last will and testament of said James Nelson upon due citation to the testator's heirs at law was duly admitted to probate by the Surrogate of the City and County of New York on the 5th day of June, 1858, and contained the following devise to his widow, Mary Elizabeth Nelson, viz: "Second.—I give, devise, and bequeath to my wife, Mary Elizabeth Nelson, all the right, title, and interest I possess in and to certain lots in Thirty-seventh Street in the City of New York, which I acquired from Chatfield H. Smith, of the value of five thousand dollars (\$5,000)."

It is through this devise and several mesne conveyances that the plaintiff claims title to the premises agreed to be sold by her to the defendants. Defendants declined to perform the contract on their part and refused to accept the plaintiff's deed, alleging as the ground for such refusal that the premises agreed to be sold were not the premises devised to Mary Elizabeth Nelson.

From the plaintiff's brief accompanying the case submitted, it appears that the facts extrinsic to the last will and testament of James Nelson, upon which the plaintiff relies in support of her title, are that, at the time of making his last will and testament and at the time of his death, James Nelson was seized of the Thirty-eighth Street premises, which had been conveyed to him on the 19th day of February, 1856, by one Chatfield H. Smith, and that said Chatfield H. Smith had never conveyed any other real property in the City of New York to the testator. And upon these alleged extrinsic facts the plaintiff contends that it was the intention of the

McGrane v. Kennedy.

testator, by the aforesaid devise to Mary Elizabeth Nelson, to devise to her the Thirty-eighth Street premises, and that the words "Thirty-seventh Street" in the devise must be deemed to be an immaterial error in the description of the said premises.

If the case agreed upon and submitted contained an explicit admission of the alleged extrinsic facts relied upon by the plaintiff, no difficulty would arise in the way of a judicial determination of the question then presented, but in the absence of such an admission, the court will be compelled to sustain the defendants' refusal to perform the contract on their part and to accept the deed tendered by the plaintiff. The admission that there does not appear of record any conveyance to the testator of premises on Thirty-seventh Street, is of itself not sufficient to warrant the court in assuming that James Nelson, the testator, was not seized of real property on Thirty-seventh Street, the title to which he may have held under an unrecorded instrument.

It is true that there appears in the case agreed upon an admission that Chatfield H. Smith in the proceedings relative to the probate of the last will and testament of James Nelson testified that he conveyed to the testator certain real property on 38th street, that he never sold him any other real property, and that he was the only person in the city of New York named Chatfield H. Smith of whom he knew. But this admission does not include a concession of the truth of Smith's testimony. Neither can it be successfully claimed that the testimony of Mr. Smith, in proceedings to obtain the probate of the last will and testament of James Nelson has any binding force or effect, or is controlling upon the heirs at law of James Nelson in any action or proceeding which may be instituted by them to recover real property, the title to which they may claim through him.

There is no provision of law or rule of evidence which would justify a contention that the testimony of a particular witness in an action or proceeding to which some of the parties to another action or proceeding were parties, is con-

McGrane v. Kennedy.

clusive upon them, in such last mentioned action or proceeding brought for a different purpose and against different parties. It is the adjudication by judgment or decree which operates as an estoppel of record upon all the parties to the action or proceeding wherein such an adjudication was made. The proceeding brought to obtain the probate of the last will and testament of James Nelson had for its sole object the establishment of the validity of the paper propounded. It is not the province of the surrogate in probate proceedings to determine the effect of a last will and testament with the aid of extrinsic facts, when the testamentary disposition of the testator's property is clear and explicit and does not trespass upon any legal restraint; and it does not appear from the case submitted that the surrogate by the decree establishing the validity of the said will undertook to do further.

Eliminating from the case the admission that Chatfield H. Smith in the probate proceedings testified as stated, no facts remain which could serve to indicate that it was the intention of James Nelson, the testator, to devise to his widow, Mary Elizabeth Nelson, any property other than that particularly described in the devise itself, to wit, property on 87th street in the city of New York.

The statement of facts agreed upon by the parties to this action is therefore entirely barren of any admission of facts or circumstances from which it can be successfully contended that the heirs at law of James Nelson are concluded by estoppel of record, resulting either from their voluntary act or the judgment or decree in a judicial proceeding, to which they were properly made parties, from asserting their claim to property of the testator which was not in express terms bequeathed or devised to others. In the absence of such estoppel of the heirs at law of said James Nelson, the plaintiff's title to the 38th street premises, agreed to be sold by her to the defendants, cannot be said to be so free from doubt as to justify a direction by this court that the defendants specifically perform the contract on their part, upon tender of performance by the plaintiff. Owing to the absence from the

Mayo v. Knowlton.

case submitted, of the extrinsic facts relied upon by the plaintiff in support of her title as hereinbefore explained, the court is constrained to answer the question propounded by the parties hereto in the negative, and judgment must therefore be awarded to the defendants and against the plaintiff for the sum of five hundred and fifty-five dollars and interest from the 17th day of October, 1889, that being the amount paid by them on account of the purchase money, and seventy-five dollars damages accruing to defendants from plaintiff's inability to perform the contract on her part, together with the costs and disbursements of this action.

LARREMORE, Ch. J., concurred.

Judgment for defendants.

SYLVANUS MAYO, Appellant, *against* DELORME KNOWLTON,
Respondent.

(Decided June 2d. 1890.)

After plaintiff had purchased stock in a mining company, at the suggestion of defendant, who assumed to act as plaintiff's broker in such purchase, the property of the company was conveyed to another company, and its shares were made convertible into shares of such other company; and plaintiff so converted his shares. Subsequently plaintiff, alleging that he had discovered that defendant, instead of purchasing the stock as broker, had merely transferred stock owned by himself and retained the purchase price, sought to rescind the purchase. *Held*, that it was not enough, for that purpose, to tender stock in the original company, not converted, which plaintiff borrowed for the purpose, still retaining the stock in the new company which he had received.

APPEAL from a judgment of this court entered on the verdict of a jury and from an order denying a motion for a new trial.

The facts are stated in the opinion.

Mayo v. Knowlton.

Charles N. Morgan and *Robert H. Worthington*, for appellant.

John R. Tresidder, for respondent.

LARREMORE, Ch. J.—This action was tried before Judge VAN HOESSEN and a jury in May, 1887, resulting in a verdict for the defendant. The complaint sets up two grounds of action. It appears that at different times in the year 1882, the plaintiff, at the suggestion of defendant, purchased in the aggregate four thousand shares of the stock of the Silver King Mining Company, for which he paid in all the sum of one thousand dollars. It is alleged that, although the defendant assumed to act as an agent and broker in these transactions, the stock which he delivered to the plaintiff upon receiving the purchase price thereof, was in reality stock owned by himself which he had merely transferred to the purchaser, himself retaining the said purchase price. It is also averred that certain intentionally false and fraudulent representations were made to the plaintiff by the defendant as an inducement to such purchase. The prayer for relief demands damages for the amount of such purchase price.

As to the first ground of action, I am of opinion that the learned trial judge correctly instructed the jury that they should "leave out of view the fact that Mr. Knowlton is charged with having been the owner of the stock that was delivered to Mr. Mayo; Mr. Knowlton denies that such was the case; but though it had been so, it would not, in view of what the evidence discloses, have given Mr. Mayo a right of action."

The general principle for which the appellant contends on this subject is undoubtedly well settled. If an agent, instead of purchasing stock for his principal from a third person or in the market, simply makes over stock of his own, the principal may rescind the transaction, tender back the stock, and demand a return of the consideration paid for it. A question of public policy is involved in this rule, and it applies although

Mayo v. Knowlton.

perfect good faith was intended and no loss has been sustained (*Conkey v. Bond*, 36 N. Y. 427; *Taussig v. Hart*, 58 N. Y. 425).

The peculiar facts proved on the trial, however, take this case out of the operation of such principle. The transfers of stock to plaintiff were made before the month of September, 1882. In the latter part of 1883 the property and assets of the Silver King Mining Company were conveyed to the Silver King Mining and Tunnel Company, and the shares of the former mining company were made freely convertible into shares of the Tunnel Company, in all respects equivalent. Plaintiff having previously procured the shares in question to be registered in his name on the books of the Mining Company, thereupon exchanged them for shares in the Tunnel Company, which he still retains. He did not attempt to rescind the purchase until 1886, claiming that not until that time did he discover the alleged fraud. He went to defendant and tendered, not the shares of the Tunnel Company which he had received in exchange, but he borrowed from different persons four thousand shares of the Mining Company's stock, which had never been transferred, for the purpose of making such tender. Plaintiff admits that he was not the owner of the shares so offered to defendant, and that he borrowed them simply for the purpose of the formal tender.

The fact whether or not defendant delivered to plaintiff stock owned by himself, and not secured by *bona fide* purchase, is immaterial, because the only right which could be conferred thereby would be that of repudiating the transaction and rescinding the sale. In order to do this a party must always tender back the stock which he has received under such voidable sale. Here the plaintiff has not made any attempt to do this. He still holds the stock he received in exchange for the original stock, and presumably is gaining the benefit of such holding. If, immediately after the discovery of the true nature of the purchase, plaintiff had gone to defendant and offered to restore as far as was within his power the property he had purchased, a different question would

Mayo v. Knowlton.

have arisen. The shares in the Tunnel Company were the equivalent of and in all respects stood for the surrendered shares of the Mining Company. A tender of those shares would have been the nearest plaintiff could have come to offering restitution. In my judgment, the so-called tender of four thousand shares of mining stock which he did not own was merely an idle ceremony.

Plaintiff's real position on this point is, that he is authorized to retain the stock, but sue for damages. This position is untenable. A principal under such circumstances may either repudiate the transaction and demand back his money or, if he so elect, may ratify the sale, retain the property, and reap its possible benefit. But he cannot hold on to the stock, presumably taking the chance of making gain thereby, and at the same time treat the wrongful act in delivering stock the agent himself owned as an independent cause of action for damages.

The learned trial judge sent the case to the jury upon the question whether false representations were made as to the stock as an inducement to the purchase. Under the facts disclosed this was the most that plaintiff could claim. We find no errors either in the charge or in the rulings upon the trial, and the judgment appealed from should be affirmed, with costs.

BOOKSTAVEN, J., concurred.

Judgment affirmed, with costs.

Morsemann v. Manhattan R. Co.

DAVID MORSEMANN, Respondent, *against* THE MANHATTAN
RAILWAY COMPANY, Appellant.

(Decided June 2d, 1890.)

The fall from an elevated railway of a crow-bar, in use by an employe making repairs to the track, whereby a person in the street below was injured, raises a presumption of negligence, which is not overcome by proof that the crow-bar was dropped through the efforts of the employe to save himself from falling.

At the trial of an action against a railway company for injuries alleged to have been caused by negligence in repairing its tracks, the judge, in charging the jury, said: "You must say whether the railroad company has used ordinary and reasonable care in performing this work upon its tracks. . . . Has it neglected the precautions which reasonable and prudent people would have taken to prevent an accident similar to the one upon which you have to pass?" *Held*, that this was not objectionable as inviting the jury to make affirmative suggestions as to possible safeguards.

In an action for personal injuries, the amount of the bills paid by plaintiff for services of physicians on account of his injuries is admissible in evidence without proof of the value of the services.

APPEAL from a judgment of this court entered on the verdict of a jury and from an order denying a motion for a new trial.

The facts are stated in the opinion.

Howard Townsend and *Alexander S. Lyman*, for appellant.

William O. Campbell, for respondent.

LARREMORE, Ch. J.—The plaintiff, while driving under defendant's elevated railway structure in Third Avenue, on the 14th day of November, 1888, was injured by a crow-bar falling from such structure, which was in use by an employe making repairs to the track. The facts of the injury and its cause are undisputed, and no contributory negligence is al-

Morsemann v. Manhattan R. Co.

leged. The trial judge correctly held that a *prima facie* case of negligence was made out (see *Maher v. Manhattan R. Co.*, 53 Hun 506), and properly ruled that the fact that the crow-bar was dropped through the employe's effort to save himself from falling did not overcome the presumption of negligence. This latter question is necessarily bound up in and a part of the general inquiry whether suitable precautions were taken for the safe conduct of the work in its entirety. The learned counsel for appellant contend that the judge erred in his charge in the too great latitude it gave the jury to determine whether proper precautions had been taken. They argue that the jury were invited to make affirmative suggestions as to possible safeguards which might have been supplied. But while the instructions were general in their terms, they were sufficiently limited by the context. The judge said: "Now this ordinary care with which the railroad is chargeable requires them to be careful, not only in the running of their trains, but also in employing competent servants to do work upon its railroad, and to use reasonable and ordinary care in selecting such appliances as are in practical use and of easy application. . . . You must say whether the railroad company has used ordinary and reasonable care in performing this work upon their tracks. . . . Has it neglected the precautions which reasonable and prudent people would have taken to prevent an accident similar to the one upon which you have to pass?"

If the charge was at all amenable to the criticism suggested by *Cummings v. Brooklyn City R. R. Co.* (104 N. Y. 669), all error was cured in the same manner that it was in that case. It appeared from the cross-examination of one of defendant's witnesses that, if the workmen had adopted the very simple expedient of laying boards, which were handy for their use, between the tracks, while this work was going on, the accident would have been prevented. As to this and other suggested precautions, it was not the province of the judge to ask the jury to say whether this or that omission in itself constituted negligence, but to instruct them, as he did, to deter-

Myers v. Dean.

mine from all the evidence, and under the circumstances disclosed, whether defendant had been negligent (*Buck v. Manhattan R. Co.*, 6 N. Y. Supp. 524).

Nor do we think it was error to admit evidence of the amount of the physicians' bills which plaintiff had paid without proof of the value of the services. This is part of the expense to which he has been put by reason of the accident. In *Gumb v. Twenty-Third Street R. Co.* (114 N. Y. 411), the plaintiff gave evidence of a physician's charge, but without giving evidence of payment or of value, and it was held error. The present case is different because plaintiff has paid the doctors' bills (fols. 107, 112). If a bill has not been paid, perhaps it would be well to insist on some proof of value to repel the suspicion of a collusive charge of a speculative fee. When the bill has actually been paid, there is little ground for such suspicion, and plaintiff would always be open to cross-examination as to a fictitious payment.

No error appearing, the judgment should be affirmed, with costs.

BOOKSTAVER, J., concurred.

Judgment affirmed, with costs.

WALTER MYERS, Respondent, *against* ROBERT J. DEAN,
Appellant.

(Decided June 2d, 1890.)

Before offering at public auction a lease of property of the City of New York, pursuant to law, the comptroller of the city, having charge of the matter, desired to obtain a reasonable offer of an upset bid for the lease. Plaintiff, a broker, procured several persons to make such offers, among them, defendant, who, plaintiff testified, agreed to pay him a commission if he would assist in obtaining the property. Plaintiff negotiated with the comptroller as to the price, and a proposal by defendant was finally made and reduced to writing, to take the lease at a certain rental, provided no one bid higher at the auction, and that defendant would pay brokerage; and defendant afterwards became the purchaser at the auction sale. *Held*, that the written proposal, with plaintiff's testimony, if believed by the jury,

Myers v. Dean.

established a sufficient consideration for a promise by defendant to pay brokerage; and that a verdict finding such a contract or an employment of plaintiff should be sustained, although defendant testified that he did not agree to pay brokerage, and that the clause as to brokerage was only inserted in the proposal to save the city from any claim therefor.

Such contract was not void as against public policy, as it did not appear that plaintiff undertook to keep away other bidders, or that he in fact did so.

APPEAL from a judgment of this court entered on the verdict of a jury and from an order denying a motion for a new trial.

The facts are stated in the opinion.

Handy & Hatch, for appellant.

P. L. Eckerson, for respondent.

BOOKSTAVEN, J.—This action is brought to recover broker's commissions in negotiating a lease of the property bounded by West, Reade, Washington, and Duane Streets in this city. The comptroller had charge of the property to rent on behalf of the city. The laws require that all leases of this kind shall be at public auction to the highest bidder. Before exposing such leases for sale, however, it has been usual and we think quite necessary for the officer having the matter in charge to obtain what he thinks a reasonable offer which the party desiring the property will make as an upset bid for the same, otherwise it might frequently happen that the property would either realise less than its value or have to be withdrawn from the sale. According to plaintiff's testimony, the comptroller wished the plaintiff to bring parties to him and to procure offers for the property in question. Notices were posted on the property stating it was to lease. Plaintiff endeavored to get various persons to make offers, some of whom did, but their propositions were refused by the comptroller because he thought them too low. Plaintiff saw the defendant, talked to him about the property, showed him a diagram of it, told him how much the comptroller asked, informed the comptroller that he had a customer in Mr. Dean before the

Myers v. Dean.

latter saw him. Previous to that time, as plaintiff testified, the defendant had agreed to pay him his commission if he would assist in obtaining the property. It was known to both the city would pay none. Plaintiff negotiated with the comptroller about the price, and had, as he testified, several interviews with him about the matter. On the 2d of November, 1888, plaintiff and defendant met by appointment at the comptroller's office, talked over the terms, and finally the defendant agreed to take the property on a lease for ten years at an annual rental of \$31,000, provided no one bid higher at the auction sale. Whereupon the proposal was reduced to writing, and it contained a clause that the defendant would pay brokerage. The public sale afterwards took place and the plaintiff became the purchaser. Defendant denied that he ever agreed to pay brokerage, or that plaintiff rendered any services in the matter or was entitled to any commissions, and claimed that the clause as to brokerage was only inserted in the proposal to save the city from any claim for it.

At the close of plaintiff's case, defendant moved for a dismissal of the complaint on the ground that defendant's promise to pay brokerage contained in the written paper was void and *nudum pactum*; so it would have been, had it stood alone, but, coupled with the testimony, we think there was sufficient consideration established, provided the jury believed plaintiff's evidence. He also moved to dismiss the complaint on the ground that no contract or employment had been proved, but we think the testimony was sufficient to warrant the submission of that question to the jury.

It was sent to the jury, and they found a verdict for the plaintiff for \$3,063.33. The evidence is conflicting, and we cannot say that the preponderance in defendant's favor is so great as to warrant us in setting it aside, even if defendant had made that one of the grounds for so doing in his motion for a new trial.

No exception was taken to the judge's charge as originally made. At its close plaintiff's counsel asked the court to

Myers v. Dean.

charge "that if the jury believe that Mr. Dean stated to Mr. Myers, before the lease was obtained, that if he obtained the lease on his offer that he would pay the commission, that then the plaintiff is entitled to recover," which it did, and defendant took an exception. The charge must be read as a whole, and the portion excepted to does not mean, as plaintiff contends, that if Mr. Dean at any time stated to the plaintiff he would pay him a commission as a gratuity if he obtained the lease. But we think it meant that, in consideration of plaintiff's services, he would pay the commission, and in this light it was not error.

The exception to the admission of expert evidence as to brokerage was not well taken. It was admissible under the allegations of the complaint and was relevant to the issues.

The question as to the legal effect of the written proposal was properly excluded. It called for a conclusion of law, and not for any fact.

Nor was the contract void as against public policy. There is nothing in the evidence from which an inference can be drawn that the plaintiff undertook to keep others away from the sale or from bidding or purchasing at the same, or that he in fact did so. The whole agreement, if made, was completed when the written proposal was submitted to the comptroller, provided no one bid higher at the auction sale, and there was no bargaining between the parties looking to keeping anyone away from that sale.

The judgment should therefore be affirmed, with costs.

LARREMORE, Ch. J., concurred.

Judgment affirmed, with costs.

Perls v. Metropolitan Life Ins. Co.

EMANUEL PERLS, Respondent, *against* THE METROPOLITAN
LIFE INSURANCE COMPANY, Appellant.

(Decided June 2d, 1890.)

In an action against an insurance company, on an alleged contract by it to pay plaintiff commissions on premiums on policies of insurance procured by him while formerly an agent of defendant, on application by him for a discovery and inspection of defendant's books, it appeared that such discovery was sought only to enable him to prove the amount of his damages ; that he had himself kept books of his agency ; and that defendant had offered to give him a statement of the facts desired as to any policy actually procured by him, if he would furnish the name of the insured ; and the good faith of the application was seriously questioned, and was not satisfactorily shown. *Held*, that the application should be denied.

APPEAL from an order of this court granting a motion for a discovery and inspection of defendant's books.

The facts are stated in the opinion.

Arnoux, Ritch, & Woodford, for appellant.

L. A. Fuller, for respondent.

BOOKSTAVEN, J.—The action in which the order was made is in form an action at law for damages for an alleged breach of contract, but in reality is to recover commissions to which plaintiff claims he is entitled as a former agent of the defendant. The contract alleged in the complaint is denied in the answer, and another contract is set up which it is alleged provided that commissions should only be paid plaintiff so long as he should not work or procure applications for any other life insurance company. The answer then alleges that he had worked for and procured applications for other life insurance companies, naming them, and that in consequence thereof all his rights under the contract were by its

Perls v. Metropolitan Life Ins. Co.

conditions terminated. It also alleges full payment to the plaintiff of commissions and all services up to such termination, and then sets up the statute of limitations.

The trial of the action will necessarily, if plaintiff establishes the contract alleged in the complaint, involve the examination of a long account, and for this reason a reference was ordered several months ago on plaintiff's motion, but, instead of proceeding with the trial, he has applied to the court for a discovery.

We think the application should have been denied. Before the plaintiff can recover any damages in this action, he must establish a breach of the contract on which he relies, and also that his action was commenced within the time limited by law. The discovery sought is not for the purpose of establishing either of these facts, but only to enable him to prove the amount of his damages, and therefore cannot in strictness be said to relate to "the merits of the action." If the books of the defendant become necessary to prove the amount of damages, he can compel their production by a subpoena *duces tecum*.

Judge RUMSEY, in his recent work on Practice (Vol. I. p. 683), says: "Whenever the object of the discovery can be obtained by the examination of a party or by a subpoena *duces tecum*, the production [of the books] will not be granted;" and again (at p. 685): It must be shown "that the evidence or information cannot be obtained from any other source and that a subpoena *duces tecum* will not answer the purpose;" citing authorities to sustain the proposition. The decisions of this court on this subject, cited by the respondent, are not in conflict with this proposition. The case of *The Union Paper Collar Co. v. The Metropolitan Collar Co.*, (3 Daly 171), was decided by Judge BRADY in 1869, and the same judge, delivering the opinion of the Supreme Court in *Harbeson v. Van Valkenberg* (5 Hun 454), said: "it is not a matter of right to inspect books and papers, and the privilege is not given except in extreme cases when the refusal may involve the loss of a claim or defense; in other words, unless it is

Perls v. Metropolitan Life Ins. Co.

indispensably necessary, and therefore essential to accomplish the administration of justice.”

No such necessity exists in this case. As before stated, the plaintiff's cause of action rests on his alleged contract and its breach. The contract he claims to have in his possession, and it is not contented that the books will show the breach of it. Indeed, the chief grounds on which plaintiff seeks the discovery, are the time and expense which will be involved in the examination of the books of defendant on the trial, and the supposed difficulty of getting the books by a subpoena *duces tecum*. The latter difficulty is more fancied than real, as the court has ample power to compel their production; and the first should not prevail in this case. For it appears from the papers that the plaintiff kept books of his agency while he was defendant's agent, and the latter, before the order in question was made, offered to give the former a full statement of the facts desired by him with respect to every policy which was procured by him as agent under the contract in suit, the name of the insured in which he would furnish to the defendant, provided that upon investigation it should be found that he did procure such policy. This, we think, under the circumstances of this case, all that the plaintiff could in fairness and justice require.

The good faith of the application is also seriously questioned by the defendant, and it is charged that the discovery is sought for ulterior purposes. These charges are not satisfactorily met by the plaintiff, although he had an opportunity to do so, and under the circumstances we think the books should only be examined under the supervision of the referee.

The order should therefore be reversed, with costs.

LARREMORE, Ch. J., concurred.

Order reversed, with costs.

Russell v. Giblin.

THOMAS RUSSELL, Appellant, *against* MICHAEL GIBLIN,
Respondent.

(Decided June 2d, 1890.)

A lease contained a covenant by the lessor to furnish the lessee with "six-horse steam power and live steam daily, as required," for the business of book-binding, to be carried on by the lessee on the demised premises. *Held*, that the lessee could not recover thereon, as damages by reason of insufficiency in the supply of steam, the value of materials rendered worthless by using his stamping-machines when the steam supply was inadequate; nor the amount of wages paid to employes when forced to remain idle for the same reason; it not appearing that he made any effort to supply the steam himself, or that he was prevented from filling any contracts for book-binding.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered on the verdict of a jury and an order denying a motion for a new trial.

The action was brought by a lessee to recover from his lessor damages for breach of a covenant in the lease. At the trial the jury found a verdict for plaintiff for six cents damages. A motion by plaintiff for a new trial was denied, and judgment was entered on the verdict. From the judgment and the order denying his motion for a new trial, plaintiff appealed to the General Term of the City Court, which affirmed the judgment and order; and from that decision plaintiff appealed to this court.

William J. Lynch, for appellant.

C. E. Souther, for respondent.

LARREMORE, Ch. J.—Defendant leased certain premises to plaintiff and covenanted to also furnish him with "six horse steam power and live steam daily, as required, from 7.30 o'clock

Russell v. Giblin.

a. m. until 6 o'clock p. m., for the general business of book-binding, to be carried on by the plaintiff in said premises." Plaintiff alleges that, owing to the insufficient steam power and live steam furnished, he was unable to keep his employes continually at work, and further, that, by reason of such insufficient service, his stamping machines were not properly heated, and that much of the book-binding he attempted to do was performed in an inferior manner and represents a loss. The action is for damages; and a bill of particulars was served in which, as in the complaint, the two items declared upon for recovery are, first, the value of the materials destroyed and rendered worthless through the use of the stamping machines when the steam supply was inadequate, and second, the aggregate amount paid to employes for wages, as estimated, for hours when they were forced to remain idle.

The first of such grounds may be briefly disposed of. Plaintiff himself was the judge of when his stamping machines were sufficiently supplied with steam to attempt to work with them. Certainly it was not permissible for him to proceed when the proper conditions for operating the apparatus did not exist, and thus spoil good materials for the sake of creating damages. His own deliberate action was a more influential factor in said damages than defendant's neglect; and no right of action, therefore, could accrue to the plaintiff therefrom (*Manhattan Stamping Works v. Koehler*, 45 Hun 150).

In the case cited there was also raised the question of the right to recover because employes did not work full time by reason of insufficient supply of power. It was said in the opinion (p. 152): "The facts sought to be proved as to the allegation that the workmen did less work are of an equally uncertain character conjective, and must be included in the damages recoverable as laid down in the cases cited."

If this means that the wages a man pays his employes are, as far as the outside world is concerned, to be considered as included in and constituting an increment of the total cost of the commodity manufactured, I concur in such view. I can find no principle of law which would authorize the

Russell v. Giblin.

charging of the amount of wages directly to defendant as damages. Plaintiff, it seems to me, might with equal show of reason endeavor to recover, by way of damages, a proportionate share of his other regular business expenses; rent, for instance. The property was hired only for business purposes. If in any week he is unable to carry on his business for two-tenths of the time he wishes to prosecute it, why should he not demand damages for two-tenths of the rent of that week, in addition to two-tenths of the hiring price of labor? The general rule as to damages is that they must be such as would "fairly be supposed to be within the contemplation of the parties when they made the contract; they must be such as might naturally be expected to follow its violation, and they must be certain both in their nature and in respect to the cause from which they proceed" (*Manhattan Stamping Works v. Koehler, supra*; *Griffin v. Colver*, 16 N. Y. 489; *Cassidy v. Lefevre*, 45 N. Y. 562).

It is not within the policy of the law to assess damages according to the principle for which plaintiff now contends. The possible total accruing might be far beyond the fair contemplation of the parties. Plaintiff might have supplied the necessary power himself and have charged defendant with the cost thereof, or he might have recovered the difference in value between the steam contracted for and that actually furnished. It is also quite possible that a third alternative was open to him under some of the later authorities, and particularly under the doctrine advanced in *Wakeman v. Wheeler & Wilson Manufacturing Co.* (101 N. Y. 205). If it could be shown that plaintiff made a fair effort to supply the steam himself and was unable to do so, and it were further proved that he was actually prevented from filling, either in whole or in part, certain contracts which he had for the binding of books, an action for damages might have been maintained to recover the profits that he would have realised from such work which he was prevented from performing. The case last cited holds in effect that prospective profits may be recovered when they are reasonably certain, and I think the ob-

Sanders v. New York El. R. Co.

jection of uncertainty as to damages would be obviated by the existence of definite contracts to be filled. The practical difficulty, of course, in a case of this character, would be to ascertain how much of the contract selling price of the manufactured articles stood for profits. Most of the cases in the books involving the question of prospective profits relate to articles not to be manufactured, but to be purchased by the plaintiff, and the prospective profit was easily ascertainable by taking the difference between the agreed purchase price and the contract selling price. Still, I do not think that this difficulty would be insuperable in a case like this; and such measure of damages, if it could be practically applied, would be the most natural and equitable one, and the one presumably within the fair contemplation of the parties at the time of the making of the lease. It is clear, however, that plaintiff's present theory of action is untenable, and the judgment appealed from should be affirmed, with costs.

BOOKSTAVEN, J., concurred.

Judgment affirmed, with costs.

ELIZABETH B. SANDERS, Individually and as Executrix of Charles W. Sanders, Deceased, Respondent, *against* THE NEW YORK ELEVATED RAILROAD COMPANY *et al.*, Appellants.

(Decided June 2d, 1890.)

Plaintiff in an action for an injunction against the maintenance of an elevated railroad in the street in front of his premises, and for damages therefrom, having deceased, the action was revived in the name of his devisee and executrix. *Held*, that, it being an equitable action, and the question of damages being merely incidental and alternative, defendants were not entitled to a jury trial as to past damages claimed for loss of rentals before the death of the original plaintiff.

A finding of fact, on trial by the court of such action, relating to damage by

Sanders v. New York El. R. Co.

smoke, steam, gas, and cinders, of which there was proof, included a statement that grease, oil, and water were allowed to drop from passing trains, of which there was no evidence. *Held*, that, no motion to amend the findings having been made, and it appearing that the error had no influence on the result, it might be disregarded as surplusage.

APPEAL from a judgment of this court entered on the decision of the judge on a trial without a jury.

The facts are stated in the opinion and in the report of the decision on the former appeal therein referred to, 15 Daly 388.

Brainard Tolles and Alexander S. Lyman, for appellants.

Henry G. Atwater, for respondent.

LARREMORE, Ch. J.—Our former decision in this action affirming the order of revivor (15 Daly 388, 7 N. Y. Supp. 641), expressly disposes of the first point raised upon this appeal. We think also that necessary inferences to be drawn from such decision must overrule appellants' second point. They contend that they should have been granted a jury trial as to the claim for past damages for loss of rentals before the testator's death. Our decision was that this action, which was pending at the time of Mr. Sanders' death, was and is an action in equity for an injunction, in which the question of damages is merely incidental and alternative. It was revived in its entirety as an equitable action, and must be preserved in its integrity as an equitable action.

There remains the point that the learned trial judge included in one of his findings of fact a statement that grease, oil, and water were allowed to drop from passing trains, and fall on Third Avenue in front of said premises. There is no evidence to support such conclusion, and we cannot look upon it as anything but an inadvertence. It does not constitute an independent finding, but is included in the one referring to smoke, steam, gas, and cinders, as to all of which there is a great deal of proof. This is not an instance of basing a judgment upon insufficient evidence or no evidence at all.

Sanders v. New York El. R. Co.

Here, in addition to the evidence upon the issues which had been tried, appears what purports to be a finding upon an issue which had not been tried. It is obvious that the judgment was intended to rest upon the findings on the issues actually discussed at the trial. The trial judge might have entertained a motion to amend his findings in this respect if the matter had been called to his attention. It is evident, upon an inspection of the whole case, that this apparent error could not have had any influence on the result. We will not presume, for the sake of reversing a judgment apparently just on the merits, that the judge, in order to enhance the damages, took into consideration elements not proved before him, and not even mentioned or referred to during the hearing. We think, under the circumstances, the obnoxious clause may be disregarded as surplusage and treated as if actually expunged.

We do not regard the case of *Pappenheim v. Metropolitan Elevated R. Co.* (7 N. Y. Supp. 679, 28 N. Y. St. Rep. 577), as controlling. There the inadvertent finding was utterly irreconcilable with and antagonistic to the judgment, and was, moreover, made as a separate and distinct finding. That decision was put upon the ground that where two findings of fact are inconsistent, the appellant is entitled, in support of his exceptions, to have that taken as true which is the more favorable to himself. The case at bar is distinguishable from the case cited.

The judgment appealed from should be affirmed, with costs.

BOOKSTAVEN, J., concurred.

Judgment affirmed, with costs.

Seitz v. Dry Dock, E. B., & B. R. Co.

FRANK SEITZ, Respondent, *against* THE DRY DOCK, EAST BROADWAY, & BATTERY RAILROAD COMPANY, Appellant.

(Decided June 2d, 1890.)

In an action against a street railroad company for injuries received in attempting to enter its horse car, plaintiff and his wife testified that he had signaled to the driver, and the car had come to a full stop, but suddenly started as he was stepping on the platform, throwing him down and injuring him. Other witnesses for plaintiff testified that the car had not stopped, but had slackened its speed so that any person could enter it without risk. Defendant's witnesses testified that it had neither stopped nor slackened its speed, but was moving at an ordinary rate. *Held*, that motions to dismiss the complaint and to direct a verdict for defendant were properly denied ; the questions of defendant's negligence and plaintiff's contributory negligence were for the jury.

Attempting to get on the rear platform of a street car, after signaling the driver to stop, and after the car has slowed up, so that it is reasonably safe to do so, is not negligence contributing to an injury received in so doing, caused by a sudden starting and change of motion of the car.

In an action for personal injuries, it appeared that plaintiff had been prevented thereby from pursuing his ordinary occupation for several weeks, but there was no evidence of the value of his earnings. *Held*, that as he was entitled nevertheless to nominal damages therefor, it was not error to instruct the jury that they might take into consideration his loss of earnings ; there being no specific request for an instruction that the recovery therefor should be limited to nominal damages.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered on the verdict of a jury and an order denying a motion for a new trial.

The facts are stated in the opinion.

John M. Scribner, for appellant.

Orlando L. Stewart, for respondent.

BISCHOFF, J.—On the 19th day of April, 1888, on Clinton Street between Division and Grand in the City of

Seitz v. Dry Dock, E. B., & B. R. Co.

New York, plaintiff, intending to become a passenger in one of defendant's cars, while attempting to board the same sustained severe injuries, some of them being of a permanent nature. Plaintiff testified that before attempting to board the car he signaled to the driver, and the car thereupon coming to a full stop he attempted to enter it, and, having hold of the guard rails, and one foot on the step of the rear platform, the car suddenly started forward, whereby he was prevented from entering, thrown violently to the ground, dragged for a space of one hundred feet or more, and thereby received the injuries of which he complains. In his narrative of the facts relating to the accident he was fully corroborated by his wife, who was a witness on his behalf. Other witnesses for the plaintiff, however, testified that the car at the time when the plaintiff attempted to board the same had not come to a full stop, but had sufficiently slackened its speed to enable any person to enter it without incurring risk of injury. Defendant's witnesses, on the other hand, testified that the car had neither slackened its speed nor come to a full stop, but was moving along at the ordinary rate of speed. Upon this conflict of testimony the trial justice declined to direct a dismissal of the complaint or a verdict for the defendant, but submitted the question of defendant's negligence and the plaintiff's contributory negligence to the jury for their determination. While it is true, as appears from the testimony, that some of plaintiff's witnesses contradicted the testimony of others to the effect that the car had come to a full stop, and asserting that the rate of speed had sufficiently slackened to enable any person to board the car, yet it is equally true that these witnesses contradicted the testimony of the defendant's witnesses to the effect that the car had neither stopped nor slackened its speed but was proceeding at the rate common to street cars.

Outside of defendant's objection to so much of the trial justice's charge as relates to recovery by the plaintiff of loss of earnings derived from his ordinary avocation in life, defendant's exceptions grouped together present the question as

Seitz v. Dry Dock, E. B., & B. R. Co.

to whether or not it was contributory negligence, as matter of law, for the plaintiff to attempt to board the defendant's car while the same was in motion. At the request of the defendant, the trial justice charged the jury, that if they believed that the car had not come to a stop when the plaintiff attempted to board it, they must find a verdict for the defendant. And inasmuch as the jury found for the plaintiff, they must, in the light of the trial justice's instructions, be deemed to have accepted as true the statement of the plaintiff and his wife that the car had come to a full stop. The jury were the sole judges of the facts, and with their determination upon the conflicting testimony of witnesses this court will not interfere, unless to prevent an abuse of the jury's province. There is nothing in the evidence to indicate that the jury were moved in their finding either by prejudice against the defendant, or by undue sympathy for the plaintiff. The defendant's contention that plaintiff was guilty in law of contributory negligence in attempting to board the car while in motion, though at a rate of speed which made it reasonably safe for any person to attempt to board it, is not well founded. This precise question was recently passed upon by the Supreme Court at a general term in the first department, and many previously reported cases duly considered (*Morison v. Broadway & Seventh Ave. R. R. Co.*, 8 N. Y. Supp. 436). The decision in that case is to the effect that it is not always contributory negligence for a party to attempt to get on the rear platform of a car after signaling the driver to stop, and the car has slowed up, if it appears from the evidence that the accident was caused by the sudden starting and change of motion of the car after the plaintiff has attempted to board it (Citing *Eppendorf v. Brooklyn R. R. Co.*, 69 N. Y. p. 195; and *Morrison v. New York Central R. R. Co.*, 63 N. Y. 643).

In delivering the opinion of the court, Judge DANIELS says: "By giving the signal to the driver, he [the driver] was apprised of the fact that the plaintiff desired to take passage on the car. And having slacked up its speed to enable that to be done, it was his duty not to endanger the plaintiff's

Seltz v. Dry Dock, E. B., & B. R. Co.

safety by suddenly putting the car in motion before he had been able to reach the platform. . . . Where a passenger is endeavoring to go upon a car in this manner, to start it up with a jerk while he is in the act of doing so necessarily tends to endanger his safety. And the act of so starting it is, in and of itself, negligence. . . . In this case, as the driver understood that the plaintiff was about to go on board of the car, . . . it was negligent for him to start up the car with a jerk before the plaintiff was safely on board.” •

In these views I concur. The defendant's exception to the charge of the trial justice, that the plaintiff may recover for loss of earnings resulting from his inability to pursue his ordinary avocations, is equally unavailing. It appears from the evidence that plaintiff, for a period of three weeks or more, was prevented, by reason of the injuries sustained, from pursuing his ordinary occupation, which was that of a shoemaker; but no evidence of the value of his earnings was given. While the absence of such evidence prevented plaintiff's recovery of substantial damages on that account, he was nevertheless entitled to nominal damages for the loss of such earnings, as the law will not assume the plaintiff's services to have been wholly valueless.

The trial justice cannot therefore be said to have committed error in his instructions to the jury that, in assessing the amount of damages to be awarded to the plaintiff, they might take into consideration his loss of earnings by reason of the injury. To have made the objection to the plaintiff's right of recovery of more than nominal damages for loss of earnings available to the defendant, a specific request that the jury be directed to limit the plaintiff's recovery for the loss of such earnings to nominal damages only, was necessary; and an exception to the refusal of the trial justice so to direct would have presented the defendant's objection to this court for review. No such request and no such exception appear in the case, and there is nothing to indicate that in assessing the amount of damages awarded to the plaintiff the jury

Shackelford v. Mitchill.

allowed him more than a nominal sum for the loss of his earnings (*Ferney v. Long Island R. Co.*, 116 N. Y. 377).

The judgment and order appealed from should therefore be affirmed, with costs to the respondent.

LARREMORE, Ch. J., and J. F. DALY, J., concurred.

Judgment and order affirmed, with costs. •

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WILLIAM T. SHACKELFORD, Respondent, *against* ANN ELIZA MITCHILL *et al.*, Executors of Samuel L. Mitchill, Deceased, Appellants.

(Decided June 2d, 1890.)

In 1846, V. assigned a policy of insurance on his life to M., who at the same time agreed that the proceeds, when collected, should be applied to the liquidation of any liabilities of V. to M., any balance remaining to be paid to V.'s legal representatives. In 1851, on a settlement between them, M. abated nearly one half of the amount due him and accepted payment of the remainder and gave V. a discharge in writing "of all demands against him," nothing being said or done in regard to the policy. M. continued to pay the premiums until his death, in 1873, and his executors paid the next premium, after which the premiums were defrayed by the earnings of the policy itself. During this time, nothing was shown to have been done by V. concerning the policy; and in negotiations between him and M.'s executors in regard to his taking it, nothing was said about it being held as security for premiums. *Held*, that in the absence of any evidence of a change in the original agreement, it must be presumed to have continued, and that, after the death of V., his assignee of the policy was entitled to an accounting with respect to it from M.'s executors.

On such accounting, interest on the payments of premiums should not be computed with annual rests, although such was the usage and course of dealings between the parties until their settlement in 1851; there having been no mutual accounts between them after that time, and no accounts of the advances for premiums having been rendered on that basis.

APPEAL from a judgment of this court entered on a trial by the court without a jury.

Shackelford v. Mitchill.

The facts are stated in the following opinion rendered on the trial at the Special Term.

J. F. DALY, J.—On October 5th, 1846, Adrian H. Van Bokkelen assigned to Samuel L. Mitchill a life policy for \$5,000 issued on that day by the Mutual Life Insurance Company of New York on the life of said Van Bokkelen, such assignment being to secure any indebtedness from Van Bokkelen to Mitchill that might arise in the course of dealings between them which began at that time, Van Bokkelen being a shipper of naval stores from Newburn, N. C., and Mitchill being his consignee in New York. Mitchill, by a writing of the same date, agreed with Van Bokkelen as follows: "The proceeds of said policy, when collected, to be applied to the liquidation of any liabilities that may be due from him to me, and any balance remaining after such liabilities are discharged to be paid over to his legal representatives."

The transactions between the parties then commenced continued down to August 1st, 1851, at which date an account was rendered by Mitchill to Van Bokkelen showing a balance due from the latter of \$25,342.76. The account was then settled by Mitchill making an abatement of one-half (excepting two sums of \$124.50 and \$334.60) and accepting, in payment of the balance (\$12,909.10) and in full discharge of all demands, acceptances of third parties for the last-mentioned sum, maturing at various times up to twelve months, which were subsequently paid.

This settlement is evidenced by writing; nothing appears in it, nor in any other paper, concerning the disposition to be made of the policy of insurance which was then held by Mitchill, and which has been kept in force by his payment of the premiums thereon (\$124.50 per annum), which premiums were regularly charged in his account with Van Bokkelen.

The \$124.50 upon which no abatement was allowed in the final account of August 1st, 1851, was probably the annual premium for 1850 paid in the previous November and charged in the prior account. After the settlement Mitchill kept the

Shackelford v. Mitchill.

policy alive by regularly paying the annual premiums up to the day of his death, May 11th, 1873, and his executors, the defendants, paid the premiums next falling due in October, 1873. After the latter date the policy became self-supporting, and the premiums were defrayed from the earnings until August 13th, 1888, when Van Bokkelen died, and the amount of the policy, which, together with additions, was \$11,000, was paid by the company to Mitchill's executors on December 18th, 1888.

Nothing is shown to have been done by Van Bokkelen concerning the policy up to the death of Mitchill, nearly twenty-one years after the settlement of the accounts between them.

After Mitchill's death, in the year 1877, his executor, Mr. Sturgis, wrote to Van Bokkelen, stating that the estate held a policy in his favor, assigned to Mr. Mitchill; that the original amount was \$5,000 and now with accumulations amounts to \$10,580; that it has become self-supporting, the yearly dividends not only paying the premiums but in addition leaving something to be added to the policy every year; and under these circumstances it was thought he might desire to purchase the policy from the estate.

No reply having been received, Mr. Sturgis wrote again in 1878, enclosing a copy of the first letter.

In 1883 or 1884 Mr. Van Bokkelen came to the City of New York and saw Mr. Sturgis; the policy, which was kept with the Safe Deposit Company, was shown him, and he was asked to purchase it (according to Mr. Sturgis' testimony) or to pay the premiums or his indebtedness on the policy, and take it and care for it himself (according to the testimony of S. D. C. Van Bokkelen). Van Bokkelen said he would see if he could take the policy up, that he would be very happy to take it up if he could arrange to get the money, and that he was not in a condition then to do anything about it. Nothing was said about its being held as security for premiums.

Van Bokkelen did nothing further until April 25th, 1888,

Shackelford v. Mitchill.

when he made an assignment to the plaintiff of all his right, title, and interest in the policy. He died less than six months afterwards.

Although there is no written evidence of the agreement upon which Mitchill held this policy after the closing of the transactions to secure which it had been originally given, there is evidence, in the testimony of S. D. C. Van Bokkelen, of an admission or declaration of Mitchill on this subject just prior to the time of the settlement of August, 1851.

This witness was the brother of the insured and was an acceptor of some of the drafts given in settlement, his firm, R. H. Berdell & Co., being acceptors of the others; he went with his brother to see Mitchill and inform him as to the responsibility of himself and his firm as proposed acceptors, and he swears that Mitchill then said that if his brother died before the drafts matured the proceeds of the policy would be applied towards their payment, and that after those drafts were paid he, Mitchill, would have no other claim against the policy.

The plaintiff, the assignee of Van Bokkelen, now sues for an accounting with respect to the proceeds of the policy and the payment of premiums by the deceased, Samuel L. Mitchill, or the defendants, his executors, claiming that there is due him from defendants the sum of \$3,146.71, as follows: Total amount of premiums paid from October, 1851, to October, 1873, inclusive, \$2,863.50, interest on each yearly premium of \$124.50 from date of payment to December 18th, 1888, \$1,889.79, making a total of \$7,853.29 to be deducted from the proceeds of the policy \$11,000, leaving \$3,146.71.

The defendants contend, first, that neither the plaintiff nor his assignor Van Bokkelen had any interest in the policy after the settlement of August, 1851; and second, that if they had such interest and the plaintiff is entitled to an accounting, there is nothing coming to him, because, by the usage and course of dealings between his assignor and Mitchill, the account for payment of premiums is to be stated in the manner in which the previous accounts between the parties were

Shackelford v. Mitchill.

stated, that is to say, with annual rests, adding interest to the principal each year and computing interest on such total as principal. By this method the account would stand as follows: Premiums and interest compounded, \$17,239.57, from which the proceeds of the policy, \$11,000, are to be deducted, leaving a balance in favor of the defendants of \$6,239.57.

There is room for question as to the terms and conditions upon which Samuel L. Mitchill held the policy and paid the premiums after the settlement of 1851. There is force in the defendants' suggestion that the policy may have been part consideration for the abatement of over \$12,000 of indebtedness then due him from Van Bokkelen. It does seem, as suggested by defendants' counsel, singular that Mitchell should continue for over twenty years to pay the premiums on the policy, as a mere accommodation to and for the sole benefit of Van Bokkelen; that during that time and for ten years longer, Van Bokkelen should not by word or act indicate that he had any interest whatever in the policy. But in the absence of evidence as to the agreement of the parties in this matter after the closing of the mercantile transactions between them, we must be guided by the presumption of law that the original agreement continued.

By this agreement, made on October 15th, 1846, any balance of the proceeds after the liabilities to Mitchell were satisfied was to be paid over to Van Bokkelen's legal representative.

There was no change in this agreement up to the time of the settlement as testified to by S. D. C. Van Bokkelen, and there is no proof that any change was made afterwards. While it is not in accordance with any known business principles or rules that Mr. Mitchill should carry this policy for so many years apparently for the mere benefit of Van Bokkelen and as a matter of charity, there is no such improbability in it as to overcome the presumption of law to which I have referred, and I feel constrained to hold, therefore, that Van Bokkelen continued to have an interest in the policy

Shackelford v. Mitchill.

and that his assignor is entitled to an accounting with respect to it.

Upon the accounting I do not doubt that interest should be computed on each payment of premium from the time of payment to the date of collection of the policy, and should not be compounded by allowing annual rests. It is true that, in the mutual accounts of the parties from 1846 to the settlement in 1851, interest was calculated and added in each account to the principal, and that upon the totals and balances interest was again computed; but there is no evidence of an agreement that the usage or course of dealings so established should continue after the settlement of the account and in respect of subsequent advances for the payment of premiums.

No account of such advances was rendered to Van Bokkelen after the settlement. Before that time accounts were sent him semi-annually or annually, but they were discontinued after August, 1851. An agreement to pay compound interest upon subsequent advances for premiums would be implied from the receipt and retention of accounts made out upon that basis, but there were no such accounts. If there were subsequent mutual accounts or dealings between the parties, even if no accounts were rendered, the presumption would be that the prior usage or course of dealings with respect to the computation of interest continued. But there is no presumption in this case, because mutual accounts and dealings had ceased. There was simply an account on one side for premiums paid by Mitchell.

The custom or usage in the prior mutual accounts is not to be presumed to continue in such an account as that. The reason for implying an agreement to pay compound interest in merchants' accounts and mutual dealings is that "an extension of time for payment is implied, and the transaction is fair, as the balance may change, and the benefit of the usage be mutual." (Kelly on Usury, 49, quoted in *Young v. Hill*, 67 N. Y. 171).

The reason for the rule does not exist in a case where there are no mutual dealings, as here, where there was merely an

Shackelford v. Mitchill.

advance to pay premiums, and no implied extension for payment, and where the balance could not change nor the benefit of the usage be mutual.

The account for premiums paid was a new account of a different character from the prior dealings between the parties, and there could be no presumption that the usage in the prior accounts was to continue in the subsequent one.

Plaintiff is entitled to judgment, with costs.

From the judgment entered on this decision defendants appealed.

John E. Parsons, for appellants.

Julien T. Davies and *Edward Lyman Short*, for respondent.

LARREMORE, Ch. J.—The judgment should be affirmed on the opinion of Judge DALY at Equity Term. I recognise, as he did, the force of the suggestion that the retention of the legal title to the life insurance policy may have been part consideration for the abatement of fifty per cent. of the former debt. But there is nothing in the case from which a court could find that it was. There was a settlement between the parties in 1851, in which plaintiff's assignor received "a full discharge of all demands against him to this date." The legal title to the policy still remained with defendants' testator, but, as it seems to me, and as Judge DALY held, such legal title was subject to the provision in the original assignment that "the proceeds of said policy when collected to be applied to the liquidation of any liabilities that may be due from him to me, and any balance remaining after such liabilities are discharged to be paid over to his [Van Bokkelen's] legal representatives."

If all liabilities were settled and discharged in 1851, even though half of the debt was merely forgiven, I cannot see how a court could make a new agreement for the parties, in the absence of any proof of a modification of the original contract between themselves.

Springer v. Bien.

I think Judge DALY has correctly held on the subject of interest. The mutual business accounts between the parties were settled and closed in 1851. Therefore, as he has shown by argument and authority, the reason for the rule allowing compound interest ceased to exist.

I am also of opinion that plaintiff was not allowed to trespass upon the fair limits of this controversy as drawn by the pleadings. Plaintiff relies upon the original assignment of 1846, and it was within the scope of his complaint to show that the indebtedness of the parties, then existing, and to accrue from subsequent mutual mercantile transactions, had been liquidated and settled in 1851, so that the clause reserving the policy to the insured and his personal representatives became operative.

BOOKSTAVEN, J., concurred.

Judgment affirmed, with costs.

JOHN H. SPRINGER, Respondent, *against* JULIUS BIEN *et al.*,
Appellants.

(Decided June 2d, 1890.)

In an action to restrain the defendants from using a certain name and trademark, and for an accounting for moneys collected under that name, the judgment was for that relief only; but among the findings of fact was a finding that the plaintiffs had employed one of the defendants to sell plaintiffs' goods on a certain commission, as to which there was no issue of fact. *Held*, that such finding was immaterial, and not *res judicata* against such defendant as to the terms of his employment in a subsequent action by him against the plaintiffs.

As a reply to an answer is required by section 514 of the Code of Civil Procedure only where a counterclaim is pleaded, new matter in an answer, not stating a counterclaim, is deemed controverted, and may be traversed or avoided in any way.

In an action for an accounting, defendants set up a counterclaim. An interlocutory judgment for plaintiff, rendered before any evidence had been given in regard to the counterclaim, contained a clause dismissing the

Springer v. Bien.

counterclaim. *Held*, on affirming the judgment on appeal, that such clause should be stricken from it, and defendants be allowed to litigate their counterclaim upon the accounting.

APPEAL from an interlocutory judgment of this court entered on the decision of the judge on a trial by the court without a jury.

The facts are stated in the opinion.

Franklin Bien, for appellants.

Palmer, Boothby, & Gildersleeve, for respondent.

BOOKSTAVEN, J.—This is an action in equity brought by the plaintiff against the defendants, constituting the firm of Julius Bien & Co., for an accounting as to moneys received by them since May 4th, 1889, upon orders for theatrical engraving procured by the plaintiff for them prior to that time, under a contract by which they agreed to pay the plaintiff ten per cent. on all moneys received by them on orders for such engraving brought by the plaintiff to them, which ten per cent. was to be paid as such moneys were received by the defendants from such orders.

All the material allegations in the complaint, except the terms of the agreement and the allegation that there was anything due the plaintiff, were either admitted by the answer or upon the trial of the action. And the findings of fact in respect to that agreement made by the learned Chief Justice were fully supported by the evidence in the case. Indeed, we do not understand the appellants to seriously challenge any of them upon this appeal.

But the defendant claims that a judgment in an action in the Supreme Court between the same parties and others, is a bar to the plaintiff's claim here, and is *res adjudicata* as against the plaintiff upon the question as to what his agreement with the defendants was. That action was commenced in the Supreme Court by the defendants in this, as plaintiffs, against the plaintiff in this action and others, as defendants, to restrain

Springer v. Blen.

them from the use of a certain name and trademark, and from doing business under that name or collecting moneys thereunder, and for an accounting for the moneys theretofore collected under that name, and for no other relief; and the judgment in that action was for that relief and that only. The allegation in the complaint in the action in the Supreme Court, in regard to what the compensation to the plaintiff in this action should be, was substantially as alleged by the plaintiff in his complaint in this action; and the plaintiff's answer in the Supreme Court action admitted that allegation. There was therefore no issue of fact to be tried upon that question in that action; and the terms of the agreement in respect to compensation were only alleged in the complaint in the Supreme Court action as one of the links in the chain upon which the right to an injunction was founded. Notwithstanding this, the plaintiffs in the Supreme Court action procured from the judge who tried it the following finding of fact:—

“Eleventh. That these plaintiffs, and the said James Mitchell as well as these plaintiffs, agreed to employ and did employ the said John H. Springer, for which he was to receive ten per cent. as aforesaid, which said commission should be paid to him as long as he remained in the employ of the defendants and the said James Mitchell prior to December 11th, 1888, and with these plaintiffs since that time.”

The eighth finding of fact in that action contains a similar finding. Obviously this finding was not a material matter within the issue which was expressly litigated and determined in the Supreme Court action, nor was it comprehended or involved in that action, as no judgment whatever could have been rendered in favor of the defendant in that action for his claim in this.

The only question to be determined in that action was whether the defendants in it had wrongfully used the name and trademark then in controversy, and whether they should be enjoined from the further use of them.

Campbell v. Consalus (25 N. Y. 613), was an action brought

Springer v. Blen.

to foreclose a mortgage. The defense set up payment. On the trial the plaintiffs claimed that prior to the commencement of that action an action had been begun by the defendant therein against the plaintiff's assignor, to cancel the mortgage on the ground that it had been paid, and that in such action the referee to whom it was referred found that the mortgage had not been paid and that there was due thereon the sum of \$2,754.88, and that the complaint in that action had been dismissed with costs. The referee in the action to foreclose the mortgage held that the prior judgment was binding to the extent that it found that the mortgage had not been paid, but that the finding of the referee in the prior action that there was due on the mortgage the sum above mentioned, being an immaterial finding and not embraced within the issues, was no evidence whatever of the amount due and was not *res adjudicata* upon that point. The referee's report was confirmed, and on appeal affirmed by the General Term and the Court of Appeals. The Court of Appeals held that, inasmuch as the finding of the referee in the prior action as to the amount due was an immaterial finding and upon a matter not raised in the pleadings, it was not *res adjudicata* between the parties; that the pleadings in that action "did not directly or necessarily require the referee to find or report how much was due on the mortgage . . . But the evidence and inquiry as to the amount due was merely incidental or collateral to the issue whether anything was due. And it would appear from the cases before cited that the principle of *res adjudicata* does not apply to matters raised only incidentally or collaterally." See also *People v. Johnson* (38 N. Y. 63).

Hence the learned judge who tried the case committed no error in finding as he did in respect to the findings of fact and of law presented to him bearing upon that subject.

Appellants also contend that inasmuch as in the XL1st section of the answer they alleged that the agreement in the complaint stated, by its terms, was not to be performed within one year from the making thereof, and that there was no note

Springer v. Blen.

or memorandum in writing of the agreement, and inasmuch as there was no reply to this allegation, that therefore the defense was admitted, and this action should not be maintained by reason thereof.

The first answer to this contention is that section 514 of the Code only requires replies to answers where a counterclaim is set up. This was not a counterclaim, but a defense, requiring no answer. New matter in an answer, not stating a counterclaim, is deemed controverted and may be traversed or avoided in any way (*Arthur v. Homestead Fire Ins. Co.*, 78 N. Y. 462).

But even if this were not so, from the time of the passage of the statute of frauds to the present day, no case can be found which adjudicates that a party may not recover for work actually done or services rendered under a contract obnoxious to such statute, and this action is to recover for money earned, and not for future or prospective damages arising from a breach of contract.

None of the exceptions to the admission or exclusion of evidence were argued on this appeal, either orally or in the briefs of counsel, and they therefore do not require any examination.

The defendants in their answer set up a counterclaim. On the trial no evidence was given in regard to it, nor indeed had the time arrived to give such evidence. But the plaintiff at the close of the case moved to dismiss the issue made by the answer as far as the counterclaim was concerned. The court very properly denied the motion. Manifestly through some inadvertence, the learned judge who tried the case signed the fourth conclusion of law presented by the plaintiff, as follows: "The plaintiff is entitled to have judgment against the defendants dismissing the counterclaim set forth in the answer and supplemental answer herein." And the judgment contains the following: "And it is further adjudged that the counterclaim set forth in the answer and the supplemental answer of the defendant herein be and the same is hereby dismissed." This clause should be stricken

Stone v. Thaden.

from the judgment so as to allow the defendants to litigate their counterclaim upon the accounting if so advised. As thus modified the judgment should be affirmed, but, under the circumstances, without costs of this appeal to either party as against the other

J. F. DALY, J., concurred.

Judgment accordingly.

AARON STONE, Appellant, *against* JOHN THADEN, Respondent.

(Decided June 2d, 1890.)

A receipt, signed by defendant, for a sum of money, paid him by plaintiff, recited that it was in part payment for a certain house, the price of which was specified, subject to mortgage. When the parties subsequently met to execute the contract, it was discovered that plaintiff had intended to purchase the fee, which defendant could not convey, having only a leasehold of the ground. *Held*, that, on proof of the fact, plaintiff might recover back the part payment.

APPEAL from a judgment of the District Court in the City of New York for the Seventh Judicial District.

The facts are stated in the opinion.

Benno Loewy, for appellant.

Langbein Bros. & Langbein, for respondent.

PER CURIAM.—[Present, LARREMORE, Ch. J., and ALLEN and BOOKSTAVEN, JJ.]—The basis of this action rests upon the following receipt:—

“Received from Aaron Stone twenty-five dollars (\$25);

Stone v. Thaden.

the same is part payment for house 508 West 47th street, the price to be \$21,000 (twenty-one thousand dollars). Subject to mortgage.

L. W. Thaden,
L. Thaden,"

and signed only by the defendant.

It may be premised that in this case at least it was understood to be a contract. The parties subsequently met to execute the contract of the sale of the premises in dispute, when it was first discovered that their minds had not met upon the transaction involved.

It is an elementary principle of law that a receipt may be explained. This rule was sought to be applied in the present litigation.

Is it reasonable to suppose that the plaintiff only intended to purchase the "bricks and mortar" of the structure, which upon its removal from the soil, according to the testimony upon the trial, was absolutely worthless? An issue was raised upon the fact as to the cost of the building, but the evidence upon this point, if material for any purpose, should have been restricted to its actual market value, and the exception upon this point was well taken.

It is claimed that the disputed question of fact as to what was intended to be sold, having been decided adversely to the defendant, is not reviewable upon appeal. In ordinary cases this principle is always upheld, but when it appears from the whole evidence that the intention of the parties to a contract is in doubt or misunderstood, a review of the facts is not only allowable but justified.

There was nothing in the receipt to apprise the plaintiff that the house stood upon leasehold ground, or the period of its duration. For aught that appears, the lease might have expired the day after his purchase.

A contract for the sale of real estate should be specific in terms. No supposed general knowledge of a purchaser, as to the character and restrictions of any locality, can be legally presumed.

Totten v. Read.

A house affixed to the freehold is a part of and passes with it (*Ward v. Kilpatrick*, 85 N. Y. 418).

The receipt was but a preliminary to the contract, and the provisions of the statute of frauds are applicable (*Cagger v. Lansing*, 43 N. Y. 550; *Baldwin v. Palmer*, 10 N. Y. 232). The plaintiff upon the evidence was entitled to recover the amount paid on account of the purchase.

It is possible, however, that the defendant, on a retrial, may be able to make a stronger case.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

CLARA TOTTEN, Respondent, *against* CASSIUS H. READ,
Appellant.

(Decided June 2d, 1890.)

Although, in an action for breach of promise of marriage, evidence showing defendant's financial condition is material, testimony by plaintiff to declarations by defendant that he was the only heir of his uncle, who would leave a large estate to him, and that she heard that he was a very rich man, is not admissible.

APPEAL from a judgment of this court entered on the verdict of a jury and from an order denying a motion for a new trial.

The facts are stated in the opinions.

Esek Cowen, for appellant.

A. W. Tenney, for respondent.

LARREMORE, Ch. J.—This is an action for breach of promise to marry. The first ground upon which the distin-

Totten v. Read.

guished counsel for appellant asks to reverse the judgment in plaintiff's favor is that the weight of evidence to support the second promise upon which she now relies is strongly in favor of defendant. But I cannot subscribe to this view. It is true that this agreement of September 22d, 1884, rests substantially on the testimony of plaintiff herself. But if her personal motive for so testifying is very obvious, that of the witnesses who contradict her is equally apparent. The latter consist of defendant and persons closely affiliated to him. Plaintiff's ground for recovery on this second cause of action is that the new promise made on September 22d constituted the consideration for the release of the then existing claim. The form of release would seem to bear out this contention. The consideration therein named is "one dollar and other valuable consideration." It is not at all likely that plaintiff, after making a demand based upon such serious grounds as she alleged for her first cause of action, would without some strong motive surrender all her rights. Unless she relied upon such new promise it is difficult to discover what the consideration moving to her was. Counsel for appellant contends that it was the \$1,200 paid to her mother. But Mrs. Cocks also had a suit pending against defendant with others, growing out of the general facts set up in plaintiff's suit, and such payment was the consideration for a general release from the mother, executed simultaneously with plaintiff's release. This money was paid with considerable ceremony, after having been formally counted by the notary in her presence, to Mrs. Cocks personally. It is argued that such payment must have in reality enured to plaintiff's benefit and been in effect a consideration for her release, because Mrs. Cocks' claim was groundless in law. Nevertheless Mrs. Cocks had brought a suit for it which she discontinued; and whether or not she could have been successful is immaterial, if defendant chose to pay her something to have the litigation dropped. It is alleged that Mrs. Cocks had spent considerable money in prosecuting such suit, and would not consent to its discontinuance without being compensated for her actual outlay.

Totten v. Read.

Certainly there is nothing grossly improbable in the jury's finding that a new engagement was entered into on September 22d, 1884, at which time all old scores between all parties were wiped out.

The trial judge did not err in the admission of the declarations of the witness Peshall. It appears that he was defendant's confidential friend and general go-between in his relations with plaintiff, arranging interviews and carrying messages and letters back and forth. There is no good reason why the ordinary principle of agency on this subject should not apply.

Objection was also made to testimony tending to show defendant's financial circumstances. It is well settled that evidence of this character is material in actions for breach of promise, as it tends to show what the plaintiff has lost in the way of maintenance, support, and position by defendant's refusal to fulfill the engagement (*Kniffen v. McConnell*, 30 N. Y. 285; *Lawrence v. Cook*, 56 Me. 187; *Miller v. Rosier*, 31 Mich. 475; *Bennett v. Beam*, 42 Mich. 346; *Watson v. Watson*, 53 Mich. 168; *Kelley v. Riley*, 106 Mass. 339).

Nevertheless, the plaintiff was allowed to testify as to alleged declarations of defendant, to the effect that he was the only heir of his uncle, who would leave a large estate to him. This evidence was clearly immaterial, and we cannot say that it did not materially increase the amount of the verdict rendered.

In *Miller v. Rosier* (*supra*) one of the reasons for reversal was that plaintiff had been allowed to show the value of a farm owned by defendant's father. The ground upon which this evidence had been allowed was that the defendant had made statements to plaintiff that his property was invested in the farm. But even under such circumstances, which rendered the argument for the admissibility of the evidence a much stronger one than can be advanced in the case at bar, the Supreme Court of Michigan held, Judge COOLEY writing the opinion, that this evidence "only went to show the father's circumstances, which were wholly immaterial to the

Totten v. Read.

case on trial." Evidence of the pecuniary resources of an uncle to whose estate the defendant is not shown to have added anything, and who is, moreover, legally entitled to devise and bequeath his estate to any person other than defendant, is even more irrelevant; and its reception was substantial error.

We think it was also erroneous, under the pretense of proving defendant's general reputation for wealth, to allow plaintiff's answer to stand—"I heard that he was a very rich man." I cannot see that this tends to establish general reputation. She may have "heard" it only once from a single person. This should have been stricken out on defendant's motion; as the record stands it is the baldest "hearsay."

In my opinion declarations of the defendant himself as to specific property, real and personal he owned or had purchased, would be admissible. They would come in under the general rule admitting a party's own statements against him which tend to prove a material fact. I do not understand that the intimation in *Kniffen v. McConnell* (*supra* at page 288), that evidence of this kind might be objectionable, was intended to apply to a case where it was confined to defendant's admissions.

Nevertheless for the errors above pointed out a new trial must be had. The irrelevant evidence was obviously introduced solely to increase the damages, and the verdict is sufficiently large to make it seem probable that it was an influential factor in the result.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

BOOKSTAVEN, J.—As the judgment in this action must be reversed on the grounds hereinafter stated and a new trial had, I prefer to express no opinion on the reasonableness of plaintiff's position or whether or not it is sustained by the weight of evidence; nor do I desire to express any opinion as to the motives which may have induced her to execute the release of the first cause of action set up in the complaint. Neither am I clear that the witness Peshall was the agent of

Well v. Kahn.

the defendant in such a sense as to allow his declarations to be received in evidence. The testimony on all these points may be greatly varied on another trial and I consider it premature to discuss it now.

But I fully concur with the learned Chief Judge that it was error to allow plaintiff's evidence of defendant's declarations that he was the only heir of his uncle who would leave him a large estate, for the reasons stated in his opinion. I also concur with him and for the reasons he states, that it was error not to strike out plaintiff's reply to a question that "I [plaintiff meaning] heard that he was a very rich man." And on these grounds I concur in the opinion that the judgment should be reversed and a new trial had, with costs to abide the event.

Judgment reversed and new trial ordered, with costs to abide event.

SAMUEL WEIL, Appellant, *against* JOSEPH KAHN, Respondent.

(Decided June 2d, 1890.)

By an interlineation in a lease it was expressly provided that all repairs were to be made by the lessee, except those to the exterior of the building; but the lease contained no provision as to who should make repairs to the exterior. *Held*, that evidence of a collateral agreement, by which the landlord was to keep the exterior in repair, was admissible.

APPEAL from a judgment of the District Court in the City of New York for the Fifth Judicial District.

The facts are stated in the opinion.

A. W. Benick, for appellant.

Well v. Kahn.

Lewis Hurst, for respondent.

PER CURIAM.—[Present, LARREMORE, Ch. J., and ALLEN and BOOKSTAVEN, JJ.]—The action was brought to recover eighteen dollars for money laid out and expended by plaintiff for the defendant in repairing the roof of a house leased by the defendant to the plaintiff. The lease expressly provided that all the repairs were to be made by the lessee except those to the exterior of the building, but there was no provision in the lease that the landlord should make those repairs. Had this been the only contract between the parties the views expressed by the justice in his opinion would have been entirely correct and decisive of this case. But upon the trial plaintiff offered evidence tending to show that there was a collateral agreement made between the parties by which the landlord agreed to keep the exterior in repair. And the provisions of the lease respecting the repairs are interlined. There could have been no object for making this interlineation restricting the tenant's obligation to keep in repair the interior, for he was bound to do this without any covenants, and therefore the interlineation adds nothing whatever to the lease, and as it is entirely silent as to who is to make the repairs to the outside of the building, we think the evidence offered in respect thereto should have been admitted (*Ward v. Cowdrey*, 5 N. Y. Supp. 282, 21 N. Y. St. Rep. 872; *Bean v. Carleton*, 6 N. Y. St. Rep. 641).

The judgment should therefore be reversed and a new trial ordered, with costs to abide the event.

Whitfield v. Broadway & S. A. R. Co.

LIZZIE WHITFIELD, Respondent, *against* THE BROADWAY
& SEVENTH AVENUE RAILROAD COMPANY, Appellant.

(Decided June 2d, 1890.)

An order of the General Term of the City Court of New York affirming a judgment of that court is not an "actual determination," from which an appeal may be taken to this court, under section 3191 of the Code of Civil Procedure; the appeal lies from the judgment entered in accordance with the directions of the order, not from the order.

APPEAL from an order of the General Term of the City Court of New York affirming a judgment of that court.

The facts are stated in the opinion.

Joseph Kunzman, for appellant.

Louis F. Doyle, for respondent.

BISCHOFF, J.—The appeal herein is from an order of the General Term of the City Court of New York affirming a judgment of that court, and not from the judgment of affirmance.

Such an order is not appealable (*Mehl v. Vonderwulbeke*, 46 N. Y. 539; *Ferris v. Aspinwall*, 10 Abb. Pr. N. S. 137; *Hollister Bank v. Vail*, 15 N. Y. 593).

Section 3191 of the Code of Civil Procedure, which regulates appeals from the General Term of the City Court to this court and upon the provisions of which the jurisdiction of this court to review the proceedings of the City Court depends, does not change the general practice. The actual determination referred to in that section comprehends either a judgment or final order, and an order is not final where it is but the preliminary step towards perfecting the determina-

Whitfield v. Broadway & S. A. R. Co.

tion of the court, upon a pending controversy. "In the sense of the Code an order is deemed final, which closes the subject matter to which it relates, or it is not final, when it is a preparation to other actions." (*Clark v. Goodridge*, 44 How. Pr. 234).

An "actual determination" in an action is the judgment rendered therein, and not an order for judgment. And this applies as well to the judgment entered upon the order of a general term as it does to a judgment in the first instance.

Subdivision one of section 3191 above referred to specifically permits an appeal to this court from a final judgment upon an appeal to the General Term of the City Court, and the general provisions of that section, allowing an appeal from an order affecting a substantial right or involving some part of the merits, are not controlling upon the specific provision for an appeal from a final judgment. An order for such a judgment is of an interlocutory nature, and an appeal from the judgment also brings up the order for review. The case is in all respects similar to an order for judgment upon a demurrer. In such a case it is not the order which determines the action, but the judgment entered in accordance with the directions of the order. And the appeal lies from the judgment and not the order (*Elwell v. Johnson*, 74 N. Y. 80).

The omission to appeal from the judgment of affirmance upon the order of the General Term of the City Court leaves this court without authority to review its proceedings, and this appeal must therefore be dismissed, with costs.

LARREMORE, Ch. J., and J. F. DALY, J., concurred.

Appeal dismissed, with costs.

Whittemore v. Judd L. & S. O. Co.

WILLIAM L. WHITTEMORE, as Administrator, etc., of Henry W. Hubbell, Deceased, Appellant, *against* **THE JUDD LINSEED & SPERM OIL COMPANY** *et al.*, Respondents.

(Decided June 2d, 1890.)

In an action against H. and T. on a joint liability, H. made default, and judgment was rendered against T. on trial by a referee; but the plaintiff entered a several judgment against each of them. Subsequently the plaintiff assigned to L. its judgment so entered against T., with all its claims against T. individually, expressly reserving its rights against the joint property of T. and H. and the individual property of H. L., afterwards, as owner of the claims of the plaintiff against T. and H., executed a release thereof to H.; and thereafter the plaintiff assigned to L. all its claims against the joint property of T. and H. The plaintiff having afterwards issued execution on the judgment against H., he brought suit to restrain its collection, claiming that he was discharged by the release of L., on the ground that the judgment should be regarded, in equity, as joint. *Held*, that he could not complain that the plaintiff therein sought to take advantage of the fact that it was too late to correct the error in the entry of the judgment.

Towards the end of the trial of such action to restrain enforcement of the execution, a motion was made to amend the complaint so that L., who was a party defendant, might be compelled personally to indemnify H. if payment of the judgment should be enforced. *Held*, that this was properly refused, as such amendment would introduce a cause of action which was not consistent with the original cause of action, and as to which, being a cause of action for damages for fraud or deceit, L. would be entitled to a trial by jury.

APPEAL from a judgment of this court entered on the dismissal of the complaint on trial by the court without a jury.

The facts are stated in the opinion.

William C. De Witt and *Edw. A. Smith*, for appellant.

Joseph H. Choate, for respondent The Judd Linseed and Sperm Oil Company.

Daniel D. Lord and *S. P. Nash*, for respondent Lord.

Whittemore v. Judd L. & S. O. Co.

BOOKSTAVEN, J.—In 1868 the defendant, the oil company, commenced an action against Henry W. Hubbell and Robert L. Taylor to recover a certain sum alleged to be due from them as copartners. Hubbell made default, and Taylor put in an answer denying his copartnership with Hubbell and his liability as such copartner. The issues thus raised were tried before the late Judge EMOTT as referee, who reported in favor of the oil company against Hubbell for \$40,950.29 and against Taylor for \$43,420.70. Upon this report the company on the 27th of April, 1872, entered judgment against Hubbell and Taylor separately for the respective amounts above mentioned, at the same time, and by means of the same record or judgment roll, although there can be no doubt that the cause of action alleged in the complaint and found by the referee was a joint liability on the part of both defendants as copartners.

This action in equity was brought by Hubbell in his lifetime to have that judgment declared satisfied and discharged, and to enjoin the defendants from enforcing or collecting the same from him or his estate. During the pendency of the action Hubbell died, and it was revived in the name of the present plaintiff, his administrator, etc.

In October, 1867, Hubbell and Taylor executed assignments of their separate property and also an assignment of their joint property to John R. Gardner, Alexander P. Irvin, and Charles A. Sherman, and in February, 1868, the defendant herein, the oil company, and the assignees, entered into an agreement by which the latter guaranteed to the former that in case it established the liability of Taylor to pay its demands in the first-mentioned action it should receive fifty per cent. of such demands as a separate composition on the part of Taylor, and in full satisfaction of all their claims and demands against him or his estate; and thereupon the company agreed, pursuant to the statute provided in such case, to release and discharge Taylor and his individual estate from all further claims, reserving for itself, however, anything that might remain due on its claims against Hubbell and his individual estate and against the joint estate of Hubbell and Taylor.

Whittemore v. Judd L. & S. O. Co.

After the entry of the judgments above mentioned, and on or about the 15th of August, 1872, the oil company assigned to the defendant Lord in consideration of \$16,750, all its claims and demands against Taylor individually and against his individual estate, and all its right, title and interest in the judgment before mentioned as entered against Taylor for the sum of \$43,420.70, and all its right, title and interest in and to the moneys due and to grow due under the same from Taylor or his individual estate. The assignment then contained this clause, viz.: "And it is expressly understood that the said Judd Linseed and Sperm Oil Company are to retain and do hereby expressly reserve all their claims and rights of every nature against the joint property and estate of Robert L. Taylor and Henry W. Hubbell, and against the individual property and estate of Henry W. Hubbell, it being intended hereby to transfer only such and any such claims as they may have against the said Robert L. Taylor individually, and his individual estate, in whatever way the same may be made available for the payment thereof."

On the 30th of September, 1873, the oil company released the assignees of Hubbell and Taylor from all claims and demands which it might have against them, which release expressly reserved the oil company's rights against Hubbell individually, or against any estate of his not then in the hands of the assignees.

On the 8th of August, 1874, the defendant Lord executed, as owner and holder of the claims of the oil company against Taylor and Hubbell, a release thereof to Hubbell. In October, 1874, the oil company assigned to Lord all their claims and rights of every nature against the joint property of Taylor and Hubbell in the hands of their assignees under the before mentioned judgment for \$43,420.70, giving Lord full power to ask and demand the same from the assignees of said joint estate, or from any person or persons whomsoever, excepting as against Hubbell and any individual or joint estate thereafter realized by him.

In April, 1876, the oil company issued an execution against

Whittemore v. Judd L. & S. O. Co.

the property of Hubbell, upon the before-mentioned judgment of \$40,950.29, claiming that the sum of \$25,060.20 was still due thereon. Thereupon plaintiff's intestate commenced this action to prevent its collection.

The case was first tried in the Equity Term for November, 1876, before Chief Justice VAN BRUNT, then one of the judges of this court. He dismissed the complaint, on the ground that the oil company never parted with its title to the judgment against Hubbell by reason of the assignments before stated, and that the defendant Lord did not have power to release Hubbell.

The evidence upon that trial was substantially confined to the documents before referred to, and the learned chief justice substantially held that, inasmuch as the judgment was entered against Taylor and Hubbell severally and not jointly, and as that judgment had never been modified, it was conclusive; and it was not worth while to discuss what would have been the effect of the papers which had been executed had the judgment been entered as a joint judgment, nor was it necessary to consider whether it ought to have been so entered, because, as he said, "in construing the various instruments which were executed, it is necessary to be governed by the actual condition of the record, and not by what I might think it should have been. . . . The judgments being several, I can see no reasons why the oil company was not at liberty to assign the judgment against Taylor, reserving all their rights against Hubbell. This it seems to me is all the oil company did by the assignment of August, 1872. . . . By this assignment the defendant Lord could collect nothing whatever from Hubbell or from the joint estate of Hubbell and Taylor, but was restricted to the individual estate of Taylor."

From the judgment entered on this decision the plaintiff appealed to the General Term. Pending this appeal, and in January, 1877, Hubbell moved at the Special Term of this court, in the action of the oil company against him and Taylor, to vacate the judgment entered against him, on the ground that judgments had been entered against him and Taylor as

Whittemore v. Judd L. & S. O. Co.

several judgments, whereas it should have been joint against both, or to amend it so as to make it a joint judgment. On this motion Hubbell introduced, as part of the proceedings, the entire record in this action, down to and including the decision of Chief Justice Van Brunt. (See bound volume, Cases in Court of Appeals, Law Institute.) The motion was denied, and Hubbell appealed from the order denying it. He also appealed from the original judgment.

All these appeals were heard by the General Term of this court, in March, 1878, composed of Chief Judge CHARLES P. DALY, Judges VAN HOESEN and J. F. DALY.

On the appeal from the judgment entered on the decision of Judge VAN BRUNT, separate opinions were written by each of these judges. Judge J. F. DALY was for reversal, on the ground that Hubbell and Taylor were in the original action sued as joint debtors and a single judgment demanded against them; the complaint charged them as copartners, Hubbell admitted this by failing to answer, and on the issues by Taylor the referee had found he was jointly and severally indebted with Hubbell, and therefore a joint judgment should have been entered against both defendants and not separate judgments against each; that notwithstanding the judgment had been so entered, it should in equity be regarded as a joint judgment against both, and therefore the assignment of the oil company to Lord of their claim under the judgment as against Taylor was effectual to transfer the whole claim to Lord, and that consequently the release to Taylor was operative to discharge Hubbell from the whole.

Chief Judge DALY and Judge VAN HOESEN in their opinions agreed with Judge VAN BRUNT that the judgment as entered was several and not joint, and they agreed that a new trial must be granted, for the reason, stated by Judge VAN HOESEN, that evidence had been improperly excluded. Judge VAN HOESEN concurred with Judge VAN BRUNT to the effect that the judgment could not be impeached collaterally in this action as a separate judgment, whether it ought to have been joint or not, and thus expresses himself on the question.

Whittemore v. Judd L. & S. O. Co.

of a new trial: "Having carefully read all the testimony, I am very much dissatisfied with the result of the trial. It is very evident that the merits of the case have not been made to appear. . . . It appears to be more than probable that some understanding existed between The Judd Oil Company and Mr. Geo. De Forest Lord, which led Lord to believe that he had a right to give Hubbell a full and clear discharge. Mr. Lord is a man of character, and a lawyer of ability and experience. In August, 1874, he gave Hubbell a release from the judgment. From what did he derive power to execute such a release? The oil company would have the court believe, from an assignment made in October, 1874. Is it to be supposed that Lord acted without authority in August, 1874? Did he execute the release in August without the right to do so? And did he in the following October procure an assignment from the oil company to cover and conceal his want of authority in August? Again, if the assignment, dated October 6th, 1874, were Lord's only authority for releasing Hubbell, how was it possible for him to believe that he was empowered to grant such a release, when the assignment in unmistakable words declares that the company reserves all its rights of every nature against Hubbell? These are matters which the trial did not clear up, and which the witnesses did not explain. Had a more liberal line of examination been fixed, it seems probable to me that evidence might have been elicited showing that Mr. Lord acted throughout in the best of faith towards all parties, and that the company, either by an oral assignment or by some written instrument which has been lost or destroyed, gave to Lord prior to August, 1874, ample authority to execute a release to Hubbell."

The appeal of Hubbell from the judgment in the original action was dismissed upon the ground that the judgment was regularly entered against Hubbell upon his failure to answer, and that so far as he was concerned no appeal would lie, and that the remedy of a party in case of judgment entered against him by default was by motion to vacate or correct it.

On the appeal from the order denying the motion to vacate

Whittemore v. Judd L. & S. O. Co.

or amend the original judgment, three separate opinions were also written: Chief Judge DALY and Judge VAN HOESEN concurring in reversing the order and in directing an order to be made correcting the judgment by making it a joint judgment against both, Judge VAN HOESEN holding that there was not merely the irregularity of entering a separate judgment against each defendant, but that there was the unauthorized act of entering judgment against one of the defendants for a larger sum than the plaintiff was entitled to recover; and the Chief Judge holding that the judgment was wrongly entered as a separate judgment when it should have been entered as a joint judgment for the amount found by the referee to be due; and in the course of his opinion, answering the point that inasmuch as Hubbell had filled his bill to restrain the prosecution by the Oil Company of proceedings against him he must abide by the result of that action, said: "It appeared in the equitable action that the judgment ought to have been entered up as a judgment against both defendants jointly for the same amount, but the plaintiff failed because it appeared by the record that the separate judgments were entered up against each of the defendants for different amounts;" and agreed with Judge VAN HOESEN that the entry of the judgment was unauthorized and not irregular merely. Judge J. F. DALY, in effect, held that the judgment as entered was a joint judgment, and not several, and there was therefore no occasion to amend or correct it; he was therefore for the affirmance of the order appealed from.

From this order made by the General Term, an appeal was taken by Hubbell to the Court of Appeals. In that court the order of the General Term was reversed and the order of the Special Term affirmed, all of the judges concurring except the Chief Judge, who was for a dismissal of the appeal. As before stated, the record of this action, down to the trial and decision of Judge VAN BRUNT, was before that court. The counsel for Hubbell took the express ground that the error in the judgment was not a mere irregularity but a substantial error. The court in its opinion says: "As the

Whittemore v. Judd L. & S. O. Co.

judgment was rendered on the 27th of April, 1872, and the order did in effect set it aside and was made on motion, notice of which was not served until January, 1877, it is apparent that it is necessary to determine whether the cause upon which the court acted was or not an irregularity and nothing more." The court then recited the proceedings in the cause up to judgment, and proceeds: "The plaintiffs at the same time and by means of the same record or judgment roll, took judgment against the defendants separately, as stated in the order to show cause. This was clearly irregular, but we think it was nothing more. The plaintiffs did not adhere to the prescribed rule or mode of proceeding, by which they were entitled to a joint judgment and which a due and orderly conduct of the suit required them to take. But this defect was merely technical, and does not affect any substantial right of the adverse party. It does not in any way increase the liability of the defendant, for upon each partner rests an absolute liability for the whole amount of every debt due from the partnership; and although originally a joint contract it may be separate as to its effects. Though all are sued jointly and a joint judgment obtained and a joint execution taken out, yet it may be enforced against one only. Each partner is answerable for the whole and not merely for his proportionable part; and as the judgments were taken against each partner for a partnership debt, the partnership property is bound to the same extent as if there had been but one judgment for the whole against both partners; nor does the form of the judgment in any way affect the debtor's relations with his copartner, for if he pays the debt or judgment, he will be entitled to contribution or to a credit for the sum paid, in any accounting respecting the partnership affairs."

Thereafter the case was retried by Chief Judge LARREMORE, and, as he says in his opinion, "a vast mass of evidence has been taken, much of it, as appeared to me when admitted, clearly immaterial, but it seemed better to allow plaintiff every opportunity to establish the parol assignment which the learned judges had suspected had been given. The re-

Whittemore v. Judd L. & S. O. Co.

sult is that I shall make the same findings as on the former trial, there being no sufficient evidence to show that any assignment, either by parol or in writing, of the individual judgment against Hubbell, was ever made to the defendant Lord."

Upon this appeal, it is unnecessary to determine whether or not a parol assignment of the judgment in question would be good and operative, as the learned justice who tried the case has found, and as we think on the evidence he was fully justified in finding, that no assignment either oral or written was proved. We agree with the learned Chief Justice that much, if not most, of the oral evidence admitted upon the trial was immaterial for the purposes of establishing an assignment, and at most it only went to prove that Mr. Lord was the attorney or agent of the oil company, and much of it was incompetent even for that purpose, as agency cannot be proved by the declarations of the agent, and the evidence referred to was merely evidence of what plaintiff's witnesses recollected of Mr. Lord's declarations.

In order to make the release executed by Lord to Hubbell effective, it must have been founded upon some assignment, either oral or in writing. The release was under seal, and was required to be under seal in order to be binding, as the law only recognizes that method of wiping out a debt without payment. But it is clear that this evidence did not in any way injure the plaintiff, and no further consideration of it is necessary.

Inasmuch as four of the judges of this court and at least six of the judges of the Court of Appeals have held that the judgments in question were several and not joint, and as four of the judges of this court have held, either sitting together or in individual opinions, that the record is conclusive against the parties in this case, and we feel bound to follow their opinions, it would be out of place for us to further discuss the question whether the judgment is or should have been joint and not several.

The plaintiff complains that a technical advantage is being taken in this action because the judgments were incorrectly

Whittemore v. Judd L. & S. O. Co.

entered as several judgments, and because it is now too late to correct such error. But the plaintiff is himself endeavoring in a court of equity to take advantage of a technical rule of law by which he seeks to avoid the effect of a judgment without paying the just debts of Hubbell's estate. A court of equity is for the purpose of a shield and not to put a sword in the hand of a suitor for such purpose. Had the judgment been originally entered as a joint judgment against Hubbell and Taylor, the release to the latter might have been executed under the statute without releasing Hubbell, or other means might have been found to effectuate what they really intended, and still to have held Hubbell's estate.

Toward the end of the trial, plaintiff's counsel moved for an amendment of the complaint so that Mr. Lord might be personally charged with indemnifying the plaintiff if the injunction were dissolved, and plaintiff was obliged to pay the judgment held by the oil company. The court reserved its decision, which was not made until the whole case was decided. Testimony, however, was taken at some length, bearing upon this question, and we think the court properly refused such amendment. First, because the amendment sought to introduce an element in this action entirely inconsistent with the groundwork of the action, which is that the judgment was in fact discharged, and any claim such as made by the plaintiff against Mr. Lord must go on the theory that the judgment was not discharged. Causes of action against several defendants can only be joined when they are all of the same nature and "are consistent with each other," and "except as otherwise provided by law, affect all the parties to the action" (Code § 484; *Equitable Life Ass. Soc. v. Schermerhorn*, 60 How. Pr. 477). The exceptions alluded to relate to mortgage foreclosures and other cases where the mode of procedure is especially provided (Code § 1627; *Vanderbilt v. Schreyer*, 91 N. Y. 392). Second, the claim thus sought to be introduced was one for damages for alleged fraud or misrepresentation, or for deceit, and therefore was a legal and not an equitable claim, and one in which the defendant Lord,

Deeley v. Dwight.

was entitled to a trial by jury. We have carefully read over the testimony on this subject and agree with the learned Chief Justice in the conclusion at which he in his opinion apparently arrived, that the evidence was not sufficient to establish any cause of action against Mr. Lord on these grounds, and that his course throughout the transactions had been upright and honorable.

For these reasons, as well as for the reasons stated by the learned Chief Justice in his opinion, which we have not herein alluded to, we think the judgment should be affirmed, with costs to both respondents.

BISCHOFF, J. concurred.

Judgment affirmed, with costs.*

ROBERT DEELEY *et al.*, Plaintiffs, *against* JOHN DWIGHT
et al., Defendants.

(Decided June 16th, 1890.)

A mortgage of chattels, given at the time of an agreement to purchase them, to secure payment of the price, although it includes articles not in existence, but to be afterwards manufactured and delivered by the mortgagee, is valid and operative between the parties, and its lien attaches to such articles as are delivered.

G. having agreed to procure and furnish to D., one of the defendants, certain machinery, obtained payment therefor in full from D. by representations as to the condition of the machinery. He afterwards engaged plaintiffs to manufacture a portion of it, and gave them his note and a chattel mortgage thereon to secure payment of the price. Plaintiffs made and delivered such portion of the machinery to G., who delivered it to D., and D. and the other defendants made considerable expenditures in setting it up in their factory. Plaintiffs did not file their mortgage for more than a year afterwards. It did not appear that plaintiffs knew of the arrangement and transactions between G. and D., although they knew that the machinery was to be put up at defendants' factory. *Held*, that defendants

*The judgment entered on this decision was affirmed on appeal to the Court of Appeals, April 14th, 1891.

Deeley v. Dwight.

were not subsequent purchasers in good faith, within the meaning of the statute making chattel mortgages void as against subsequent purchasers and mortgagees in good faith, unless filed as prescribed therein (Laws 1883 c. 279 § 1); and that, G. having made default in payment of the price, plaintiffs, having demanded the machinery from defendants, could maintain an action against them for unlawful detention thereof.

EXCEPTIONS taken at a trial term of this court and ordered to be heard in the first instance at the General Term.

The action was brought for the conversion of certain machinery which plaintiffs claimed by virtue of a chattel mortgage executed to them by one Gandolfo in February, 1884. The defendant, John Dwight, claimed the machinery as purchaser from Gandolfo, and as plaintiffs' mortgage was not filed as required by statute, defendants insisted that it was void as against John Dwight as a purchaser in good faith, and also claimed that plaintiffs were estopped from asserting their rights under the mortgage.

George P. Hoteling, for plaintiffs.

A. P. Ketcham and *James A. Seaman*, for defendants.

LARREMORE, Ch. J.—The learned judge who tried this case evidently had grave doubt as to whether or not a correct disposition had been made of it, and therefore ordered the exceptions to be heard in the first instance at General Term. After reflection and an examination of authorities—the opportunity for which is always necessarily limited at trial term—we have concluded that such doubt was well founded. It appears that defendants, in or about September, 1883, entered into a contract with one Gandolfo to procure and sell to them certain articles of machinery to be selected by him. Gandolfo engaged plaintiffs to manufacture a portion of such machinery, and they agreed to do so, arranging to take a note and a chattel mortgage from Gandolfo upon the articles to secure the payment thereof. Such note and mortgage bear date and were delivered in February, 1884;

Deeley v. Dwight.

but, previous to such time, to wit, in December, 1883, upon representations as to the nature of the proposed machinery, Gandolfo had secured payment in full therefor from the defendants to him. This fact must be deemed established for the purposes of this trial. See the admission of the defendant John Dwight, at folio 292. The articles were delivered to Gandolfo, and by him to the defendants; but Gandolfo never paid plaintiffs for them; and the latter claim in this action for the price thereof under their chattel mortgage. Said mortgage was not filed until May, 1885.

Plaintiff's cause of action is founded on the mortgage, and defendants contend on several grounds that this instrument must be disregarded. It is claimed in the first place, that the mortgage was void, because at the time of its execution some of the articles which it then purported to, and which it did eventually, cover were not in existence. But I cannot discover any substantial force in the arguments for this view. The situation was, that Gandolfo and plaintiffs made a contract for the manufacture of the machinery, one of the terms of which was that they should retain a lien upon the articles until paid for. I can see no good reason why a purchase-money mortgage on chattels should not be equally favored in law with a purchase money mortgage on land. There is of course the distinction that a mortgage on land is theoretically only a lien, while a mortgage on personal property effects a conditional sale. We have, therefore, a sale to the vendee and a simultaneous conditional sale back to the vendor. Still, this was practically the condition of affairs as to mortgages on real estate at common law, and is yet in many states of the Union; and everywhere a purchase-money mortgage is one of the securities most jealously protected by the courts. The element of futurity does not operate to take the present case out of the usual rules governing purchase money mortgages; it rather tends to make such rules apply with greater force. A vendor contracts to manufacture certain specific articles, and also contracts for the security of resort to the articles themselves for his compensation. The only possible

Deeley v. Dwight.

view to take under these circumstances, is that the mortgage so given, which describes the articles to be made, attaches to the same as they are successively turned out and delivered to the vendee (See *Ludwig v. Kipp*, 20 Hun 265; *Willets v. Brown*, 42 Hun 140, and cases there cited; *Stevens v. Watson*, 4 Abb. Ct. of App. Dec. 302; *McCaffrey v. Woodin*, 65 N. Y. 459; *Wisner v. Ocumpaugh*, 71 N. Y. 113; *Coates v. Donnell*, 94 N. Y. 168).

Defendants, however, claim that such mortgage was void as to them, under the statute, because it was not filed until over a year after it was made. The law makes a chattel mortgage, unless filed, void as against subsequent purchasers and mortgagees in good faith; and the question which was principally argued on this appeal is, whether defendants can be held to be "subsequent purchasers in good faith" within the meaning of the act. I think this question has been so decisively answered in the negative by a long line of authorities in this state that little discussion will be required on our part (*Van Heusen v. Radcliffe*, 17 N. Y. 583; *Thompson v. Van Vechten*, 27 N. Y. 580; *Wood v. Robinson*, 22 N. Y. 564; *Weaver v. Barden*, 49 N. Y. 286; *Barnard v. Campbell*, 65 Barb. 286; *Same Case*, 55 N. Y. 456, and 58 N. Y. 73; *Voorhis v. Olmstead*, 66 N. Y. 116; *Dusenbury v. Hurlbert*, 59 N. Y. 541; *Kursheedt v. McCune*, 20 Abb. New Cas. 265).

The principle is well established by these cases that a "subsequent purchaser in good faith" is one who parts with value at the time of the transfer of title to or delivery of the identical property, and on the faith of such transfer or delivery. The term cannot be held to include one who receives the property in question either in pursuance of an executory contract of sale, or in satisfaction of an antecedent debt. It is not claimed that any transfer of title, either by constructive delivery or otherwise, was attempted to be made to defendants until the actual delivery of the machinery. On the other hand, it is proved conclusively by the aforesaid admission of one of the defendants, that the money which defendants intended for the purchase price was all paid before the execu-

Deeley v. Dwight.

tion of the mortgage, and before the greater part, if not all, of the articles were made.

Defendants did not, as has been argued here, make themselves "subsequent purchasers in good faith" by expending various sums in cartage of the machinery, and in setting the same up in their factory. Such expenditures, though in one sense made upon the faith of the transfer and delivery of the property, have not the least significance in determining in what character they became purchasers, or whether they became purchasers at all. These expenses would necessarily have been incurred no matter how they acquired the machinery, whether as purchasers or hirers or by gift. The determining factor is, when and upon what reliance was the purchase price paid? Here the purchase price was paid before defendants received the articles, and they relied simply upon Gandolfo's word that he would procure such articles for them. Defendants, therefore, were not subsequent purchasers in good faith within the definition of that phrase given by the authorities above cited, and it follows that, as between the parties to this action, the mortgage was valid and is operative (*Van Heusen v. Radcliffe, supra*; *Thompson v. Van Vechten, supra*; *Kennedy v. Union Bank*, 23 Hun 496).

We are also of the opinion that plaintiffs may maintain the present action of conversion. Their right is disputed on the alleged ground that they are not entitled to the immediate possession of the chattels. But this is error. We have decided that the mortgage is valid, as between the parties to this litigation, and consequently all the rights it purports to confer on the mortgagees are valid. One of such rights is to take possession of and dispose of the mortgaged chattels in case of default in payment of the debt. Plaintiffs are, therefore, entitled to assume immediate possession, and, a demand for such chattels having been made (fol. 83), it follows that they may bring an action to recover such damages as they may have sustained by the unlawful detention of the same (*Jones v. Graham*, 77 N. Y. 628).

Deeley v. Dwight.

The exceptions should be sustained and a new trial ordered, with costs to abide the event.

BISCHOFF, J.—I concur in the opinion of the Chief Justice that the payment of the purchase money by the defendant John Dwight to Joseph Gandolfo, under the latter's executory agreement for the sale of the machinery in question, before such machinery had come into existence, and before Gandolfo himself had acquired title thereto by purchase from the plaintiffs, cannot constitute Dwight a purchaser for value so as to defeat the lien of a chattel mortgage, which was not filed in the manner provided by statute, and that the chattel mortgage given by Gandolfo to the plaintiffs at the time of his agreement with them to purchase the machinery subsequently delivered to him, was valid and operative as between the parties thereto, the lien attaching upon the delivery of the machinery.

Nevertheless, if it had been conceded upon the trial, either expressly or by failure of the plaintiffs to contradict evidence to that effect, that the plaintiffs were aware of the arrangement between Gandolfo and the defendants for the sale of the machinery, and of Gandolfo's representations to the defendants that he was the absolute owner of the machinery and could convey a perfect title thereto, and that, notwithstanding such knowledge, the plaintiffs had permitted defendants, in reliance upon Gandolfo's representations, to expend large sums in alterations and improvements upon this machinery, largely in excess of its original value, the plaintiffs should now be estopped from asserting, as against the defendants, any claim to this machinery under the chattel mortgage to them.

A careful examination of the evidence, however, fails to show that the plaintiffs knew of the arrangement between Dwight and Gandolfo, and of the latter's representations of his absolute ownership and ability to confer an unincumbered title.

In fact, Robert Deeley, one of the plaintiffs, examined as a witness in his own behalf, distinctly says (at fols. 51, 52, 53,

Deeley v. Dwight.

54, 55), that the machinery was agreed to be sold to Gandolfo; that it was delivered upon trucks supplied by Gandolfo; that Gandolfo represented to him that the machinery was to be put up at Dwight's factory for experimental purposes only, and that he was wholly ignorant of any intention on Gandolfo's part to deliver the machinery to Dwight.

From the absence of evidence tending to charge the plaintiffs with knowledge of Gandolfo's executory contract of sale with the defendants, and of his intention to deliver the machinery to Dwight pursuant to such contract, and that Dwight, relying upon Gandolfo's representation of absolute ownership and ability to convey an unincumbered title, intended to expend the money which was said to have been expended in alterations and improvements; and, further, because of Robert Deeley's disavowal of any such knowledge, there does not appear any sufficient ground for holding the plaintiffs estopped from asserting their claim under their chattel mortgage, as against the defendants.

If the defendants were duped, it was, so far as was shown on the trial, in consequence of the misrepresentations of Gandolfo, and of his fraudulent concealment of his mortgage to plaintiffs, and not because of any act of the plaintiffs, or because of their omission to do anything, which, in view of their want of knowledge of the arrangements between Dwight and Gandolfo, could reasonably have been expected of them.

The plaintiffs' exception to the learned trial justice's direction of a verdict for the defendants should therefore be sustained and a new trial ordered, with costs to abide the event.

J. F. DALY, J.—It is substantially shown by the evidence that, about September, 1883, one Gandolfo agreed to furnish the defendant, John Dwight, certain specified machinery at the estimated cost of \$5,660. This machinery was intended for Dwight's factory, and was to be put up and started running in connection with other machinery at an additional expense which ultimately approached \$7,000. Between October 23rd and December 12th, Dwight paid Gandol-

Deeley v. Dwight.

fo in full for the specified machinery, although it had not then been delivered, Gandolfo representing at first that it was in process of manufacture, and afterwards that it was stored waiting for the completion of alterations in Dwight's factory where it was to be placed. In February, 1884, Gandolfo ordered the machinery in question in this action from the plaintiffs at a cost of \$4,700, giving them then his note and a chattel mortgage to secure the purchase price. The plaintiffs did not file their mortgage, and Gandolfo went on and delivered the machinery, as he received it from plaintiffs, to Dwight, pursuant to the original contract made in September, 1883; Dwight expending in the erection and fitting of it in his factory, and the purchase of necessary machinery for that purpose, about the sum of \$7,000. The delivery was made between February and April, 1884. The chattel mortgage was not filed until May, 1885.

It is claimed by the plaintiffs that their mortgage, notwithstanding their failure to file it, was good as against Dwight, because at the time of the delivery of the machinery to him he did not part with anything of value to Gandolfo, having paid in full for it in advance by the payments made in the previous year. It is undisputed that such advance payments included payment for the machinery in question, and the right of defendant, John Dwight, to claim the position of a purchaser for value at the time of delivery was open to question upon the authorities (*Kursheedt v. McCune*, 20 Abb. New Cas. 265; *Dusenbery v. Hurlbert*, 59 N. Y. 541; *Barnard v. Campbell*, 65 Barb. 286; affirmed, 55 N. Y. 456, and 58 N. Y. 79; *Voorhis v. Olmstead*, 66 N. Y. 113).

But under the circumstances it would seem that the plaintiffs should be estopped from asserting their mortgage against the defendants. They sold and delivered their goods to Gandolfo, conferring upon him the apparent unencumbered title, withholding their mortgage from the files, and permitting him to impose upon the defendants to the latter's damage in the large outlay needed to set up the machinery and make it available. They knew that the machinery was to be set up

Deeley v. Dwight.

in the factory of defendants, and must have known that large expenses would be incurred for that purpose. The act of withholding their mortgage from the files was evidently intended to induce the defendants to go on and deal with Gandolfo as one having an unencumbered title, and it did have that effect. The advantages to the plaintiffs by this course are conspicuous; had they filed their mortgage or asserted their rights in any way at the time of delivery, the result would have been that the defendants could have refused to receive the machinery from Gandolfo, and the plaintiffs would have had it back upon their hands.

By the plaintiffs taking the course they did, the defendants were induced to make such outlays as would practically force them to pay the purchase price over again to plaintiffs, or lose the benefit of their subsequent expenditures. They were therefore induced by plaintiffs' act to alter their position, and are brought within the exception noted in one of the cases above cited and relied upon by the plaintiffs (*Barnard v. Campbell*, 58 N. Y. pp. 73-76). The court there lays stress upon the fact that the purchasers parted with no value, incurred no liability, and in no respect changed their situation in the interval between the delivery of the merchandise by the plaintiffs to Jeffries and their disaffirmance of the contract and reclaiming the goods. In other words, they did nothing in consequence of such delivery. So in *Weaver v. Barden* (49 N. Y. 286), it is said that the purchaser must have parted with something of value upon the faith of his purchase before he had notice of the prior right. In this case the expenditures in setting up the machinery, the purchase of shafting, belting, pulleys, etc., and for work and labor, amounting to nearly \$7,000, largely exceed the value of the machinery itself, (\$4,700). This large expense was incurred in good faith in reliance upon Gandolfo's apparent absolute ownership and unencumbered title, for which the plaintiffs are directly responsible. The case is within the principle stated in the opinion of DANFORTH, J., in *Dows v. Kidder* (84 N. Y. 128), and the cases generally on the law of estoppel. The knowl-

French v. Bauer.

edge by the plaintiffs that Gandolfo was to set up the machinery in defendant's premises, the delivery of possession to him, and the suppression of their mortgage, taken together, show an intent to induce the third parties with whom Gandolfo might deal, to treat his title as unencumbered.

The defendants should have judgment upon their verdict, and the motion for a new trial should be denied, with costs.

Exceptions sustained and new trial ordered, with costs to abide event.

JAMES C. FRENCH *et al.*, Appellants, *against* JOHN GEORGE BAUER *et al.*, Respondents.

(Decided June 16th, 1890.)

By a contract for the erection of a building by S. for the owner, to be paid for in six instalments, the fifth instalment was to become due when certain specified work should be done. F. & B. contracted with S. to do part of the work, and plaintiffs contracted with F. & B. to do a part of their work, required to earn the fifth instalment. That work was done by them, with the owner's knowledge, and the fifth instalment, having become due, was paid by the owner to S., and S. paid to F. & B. the amount due to them. The next day F. & B. made an assignment. *Held*, that a mechanic's lien thereafter filed by plaintiffs could not be enforced, all that was due or to become due to F. & B. having been paid in good faith; as the statute expressly provides that the owner shall be liable to pay no greater sum than the price stipulated to be paid in the contract.

APPEAL from the District Court in the City of New York for the Tenth Judicial District.

The facts are stated in the opinion.

E. D. McCarthy, for appellants.

James K. Angell, for respondents.

BOOKSTAVEN, J.—The action was brought to foreclose a mechanic's lien filed against the premises 3467 Third Avenue, in this city.

French v. Bauer.

The defendant Bauer was the owner of the lot and the defendant Peter Spoonheimer entered into a contract with him to erect and fully complete a building thereon, for which he was to be paid in six instalments. The fifth instalment was to become due when the cellar was concreted and the sidewalk and all exterior iron and stone work was completed.

Spoonheimer contracted with the firm of Findley & Bowman to do all the iron work required on the building and the sidewalk, and the plaintiffs, on or about the 13th of October, 1888, contracted with Findley & Bowman to put down all the patent light frames and tiles required by Spoonheimer's contract, for the sum of \$100. Plaintiffs performed their contract on or before the 24th of October, 1888. All the stone work and exterior ironwork had been fully completed before the 29th of October, 1888, and on that day the architect gave his certificate to that effect, and on the same day the defendant Bauer paid the defendant Spoonheimer the fifth instalment due.

On the 2nd of November, 1888, Spoonheimer and Findley & Bowman had a settlement and adjustment of their matters, and on that day the former gave a check, dated November 5th, for the balance found due the latter, and they gave him a receipt in full dated on the last named day. The check thus given was cashed on the same or the following day, and paid by Spoonheimer's bank when it was presented.

On the 3rd of November, Findley & Bowman made an assignment, and on the 7th of November one of the plaintiffs had an interview with Mr. Bauer and Mr. Spoonheimer and asked payment of his claim; he was told that Findley & Bowman had been paid in full, and also that they had made an assignment, as they had learned from the papers. On the 9th of the same month plaintiffs filed the lien which this action is brought to foreclose. At that time the last instalment of \$1,000 had not been paid to Spoonheimer, nor was it then due. Notice of the lien was also served on Bauer.

All the foregoing facts appeared on the trial, and the attention of the jury was sharply called by the charge of the

French v. Bauer.

court, strongly in favor of plaintiffs, to the question of the good faith of the fifth payment, and also of Spoonheimer's payment to Findley & Bowman, and the jury, on what we consider sufficient evidence, found in favor of the defendants. So the facts that Bauer did not make the fifth payment before its maturity, and that Spoonheimer made his final payment to Findley & Bowman in good faith, we must regard as established beyond controversy.

Appellants contend that, notwithstanding these facts, inasmuch as there still remained \$1,000 of the contract price to be paid by Bauer to Spoonheimer for work not then completed, they should have been paid out of that, claiming that the contract price is a common fund out of which all liens should be paid.

But, by the terms of the contract between the defendants, Bauer was required to make the fifth payment when the cellar was concreted and the sidewalk and all exterior iron and stonework completed. This was all done on the 29th of October, and as no lien had then been filed by plaintiffs, Bauer paid, as in duty bound, the whole amount of that instalment to Spoonheimer. And the latter, as the jury have found, paid Findley & Bowman in good faith all that remained due them on or before the 5th of November. The plaintiffs did not file their lien until the 9th of that month, and of course acquired no lien before that time. When they did file their notice of lien it could only attach to what was due or to become due to Findley & Bowman (*Lumbard v. Syracuse, etc., R. R. Co.*, 55 N. Y. 491), and there was nothing then due or to become due them, so nothing was attached. There was no privity of contract between the plaintiffs and the defendant Spoonheimer; the former contracted with Findley & Bowman, and if plaintiffs did not rely upon the responsibility of that firm, but upon the lien given by the statute, it was their duty to have examined not only Findley & Bowman's contract but also the contract between the defendants to ascertain the terms of payment, and then they should have filed their lien in time to have anticipated the fifth payment.

French v. Bauer.

See *Hagan v. Amer. Baptist etc. Soc.* (14 Daly 131), where this question is fully discussed, and authorities cited.

Appellants' contention, if sustained, would work a great injustice to the principal contractor Spoonheimer, for the law of 1885 (L. 1885 c. 342 § 1), expressly provides the owner shall be liable to pay no greater sum than the price stipulated to be paid in the contract, and the mere fact that he saw one of the plaintiffs doing some work there would not alter his liability in this respect, as he had not contracted with him. The principal contractor would therefore be the only one who would have to pay the claim, but he had contracted for this work with Findley & Bowman and not with the plaintiffs. He in good faith paid that firm for this very work without any notice given by plaintiffs of their claim, and it would be unjust to compel him to pay for the same work twice. It is not the duty of the contractor to hunt up everyone who may have worked for or furnished materials to a subcontractor, and ascertain whether they have been paid; it is their duty to give him the notice required by law in order to bind him. The cases cited by the appellants do not support their contention, but each one of them recognizes the principle herein set forth.

The judgment should therefore be affirmed, with costs.

LARREMORE, Ch. J., concurred.

Judgment affirmed, with costs.*

* Leave to appeal to the Court of Appeals from the judgment entered on this decision was granted December 1st, 1890.

Quill v. New York Central & H. R. R. Co.

**JOHN QUILL, as Administrator, etc., Respondent, *against*
THE NEW YORK CENTRAL AND HUDSON RIVER RAIL-
ROAD COMPANY, Appellant.**

(Decided June 16th, 1890.)

While plaintiff's intestate was standing near the most westerly of the four tracks of defendant's railroad, at a public street crossing, that track being in use for the storage of cars, not for the passage of trains, a train, backing on another track, struck a cart crossing the tracks in a westerly direction, throwing the cart forward on him and inflicting injuries which caused his death. *Held*, that, in an action therefor, a refusal to charge that, if the negligence of the driver of the cart caused the accident, plaintiff could not recover, was not error; and that a charge that there could be no recovery if the accident was caused exclusively by the negligence of the driver of the cart was proper.

Nor was it error to decline to instruct the jury that the fact that it did not appear that, at any time previous, an accident had occurred at that place, must be taken as conclusive proof of the sufficiency of the provision made by defendant by stationing flagmen there to warn persons of approaching danger.

It was proper to charge that, if a sudden and instinctive effort on the part of the driver of the cart to escape impending danger after receiving warning thereof resulted in the accident, there not being sufficient time to form an intelligent and deliberate judgment as to the best means of escape, negligence was not imputable to him.

Under the circumstances, contributory negligence could not be imputed to deceased, as matter of law, merely because he remained within or partly within the rails of the westerly track at the time of the approach of the train; whether he used proper care was a question for the jury.

The mere statement of the judge in his charge that the crossing was a dangerous one did not amount to a misdirection, he having left all essential facts to be determined by the jury, and no specific request having been made that that fact be submitted to them.

The exclusion of flags, offered as exhibits, alleged to be similar to the one used by the flagman at the time of the accident, and of testimony relating to them, was not error such as to entitle defendant to a new trial, such flags not being the only means available to defendant for the purpose for which they were offered.

APPEAL from a judgment of this court entered on the verdict of a jury and from an order denying a motion for a new trial.

Quill v. New York Central & H. R. R. Co.

The facts are stated in the opinion.

Frank Loomis, for appellant.

Hugh L. Cole, for respondent.

BISCHOFF, J.—This action was brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the carelessness and negligence of defendant's servants in the management of a train of cars, on the 29th day of March, 1888, at 130th Street and North River, in the City of New York. It appears that the road of the defendant at that place consisted of four tracks, and that at the time of the accident the decedent was standing west of the westerly track, and entirely outside of it, as some of the witnesses assert; or, according to others, with one foot on the westerly rail of the westerly track, which track at the time of the accident was in use only for the storage of defendant's freight cars and not for the passage of its trains. At the foot of West 130th Street, and west of defendant's tracks, there was a public ferry to Fort Lee, New Jersey, and a coal yard owned by one Tone. Murphy, the driver of a coal cart, was proceeding westward along 130th Street, towards Tone's coal yard, and had nearly succeeded in crossing defendant's tracks, when the tail end of his cart came into collision with one of the defendant's freight trains which was being backed in a southerly direction across 130th Street. The collision caused the coal cart to be thrown forward in a westerly direction upon plaintiff's intestate, thus inflicting upon him the injuries which caused his death shortly afterwards.

It was contended on the part of the plaintiff, that, at the time of the accident, the decedent was in a position of perfect safety to himself; that the collision between the coal cart and the defendant's train was due to neglect on the part of the defendant's servants to give proper and timely warning of the danger of an approaching train to persons seeking to cross the railroad at 130th Street; that persons attempting to

Quill v. New York Central & H. R. R. Co.

cross the railroad at 130th Street in a westerly direction were prevented by intervening obstructions from seeing trains coming from the north in time to avoid a collision, and that Murphy was not sufficiently warned by defendant's flagman or otherwise to afford him opportunity of avoiding impending danger.

Defendant, on the other hand, contended that trains approaching from the north were visible at a distance sufficient to warn Murphy of the danger of an attempt to cross the track, and to allow him ample opportunity to remain in or to reach a place of safety ; but that, not heeding the warning of the flagman, or the bell of the approaching train, he recklessly proceeded to cross the track, thus causing the collision which resulted in the death of the plaintiff's intestate. Defendant also contended that the decedent himself was guilty of contributory negligence in remaining where he was at the time of the accident.

At the trial there was testimony in support of the several contentions of the parties to this action ; the plaintiff maintaining that the decedent met his death solely through the carelessness of defendant's servants, and the defendant contending that the negligence of the plaintiff's intestate contributed to the injury, and also that the accident was caused wholly by the recklessness of Murphy. Upon this conflicting evidence the learned trial justice submitted the question of defendant's negligence and the decedent's contributory negligence to the jury, who found a verdict in favor of plaintiff for three thousand dollars. There was sufficient evidence to sustain a finding of negligence on the part of the defendant's servants, and of no contributory negligence on the part of the decedent, and the appellate court cannot disturb the verdict on the ground that it was not warranted by the evidence.

The trial justice was requested to charge the jury that if the negligence of the driver of the cart caused the accident the plaintiff could not recover. That request was refused. The justice, however, charged that the plaintiff could not

Quill v. New York Central & H. R. R. Co.

recover if the accident was caused exclusively by the negligence of the driver of the coal cart. Neither the refusal to so charge as requested, nor the charge as made, is erroneous. It is well settled by an abundance of decisions that for injuries caused by the concurrent negligence of two or more persons any or all are liable (*Booth v. Boston R. Co.*, 73 N. Y. 48; *Webster v. Hudson R. R. Co.*, 38 N. Y. 161).

The trial justice charged the jury that if they believed the stationing of the flagman by the defendant to warn persons of approaching danger was sufficient for that purpose, negligence could not be imputed to defendant because of its failure to provide other means for the same end. But he declined to instruct the jury, as requested, that, in considering the sufficiency of provision by flagmen, the fact that it does not appear that at any time previous an accident had occurred at that precise place, must be taken as conclusive proof of such sufficiency. No error was committed in that declination to instruct the jury. The question under consideration was the negligent conduct of the defendant's servants at the time of the accident to the plaintiff's intestate, and the fact that there was no proof of any accident at that same place, prior to the one resulting in his death, does not appear to be either relevant or material to the determination of the question at issue.

An exception was also taken by defendant to so much of the charge as stated that if a sudden and instinctive effort on the part of the coal cart driver, Murphy, to escape impending danger after receiving warning thereof, resulted in the accident, there not being sufficient time to form an intelligent and deliberate judgment as to the best means of escape, negligence was not imputable to him. This charge was proper and is well sustained by authority (*Lowrey v. Manhattan El. R. Co.*, 99 N. Y. 158).

It was proper for the trial justice to submit to the jury the question of decedent's contributory negligence in remaining within, or partly within, the rails of the westerly track at the time of the approach of the train from the north. If the

Quill v. New York Central & H. R. R. Co.

plaintiff's version of the accident be true, the decedent's position was one of safety to himself, the westerly track being obstructed by defendant's cars and not otherwise in use, and being at such a distance from the main down track, upon which the collision occurred, as to render it practically impossible for the decedent to receive injury from the approaching train without the intervention of negligent conduct on the part of defendant's servants or others. Hence, under such circumstances, contributory negligence could not be imputed to him as matter of law. It was not unlawful for him to be upon the westerly track upon the public highway, to the use of which he was as much entitled for the purpose of transit as was the defendant for the operation of its road. It was incumbent upon him to use proper care and caution in travelling upon the public highway, so that the risk of injury to himself might be avoided, and whether he did so or not was eminently a question of fact to be determined by the jury. Neither did the statement of the learned trial justice that the crossing was a dangerous one amount to a misdirection; it was at most a statement of his opinion upon the evidence. The charge fairly and impartially left all facts necessary to support a verdict to be passed upon by the jury, and the mere statement of his opinion by the trial justice concerning the evidence, not involving an instruction to the jury that they must accept as true a fact concerning which there was conflicting evidence, when the charge directed all essential facts to be determined by the jury, was not subject to a valid exception (*Massoth v. President, etc., of Del. & Hud. Canal Co.*, 64 N. Y. 534).

And though the particular portion of the charge excepted to may have, in effect, amounted to an assumption of a fact which should have been left to the jury, the exception to it would be nevertheless, insufficient, unaccompanied by a specific request that the fact assumed be disposed of by the jury, and there is no such request before us (*Mallory v. Tioga R. Co.*, 8 Abb. Ct. of App. Dec. 139).

The only exception urged by the defendant to the rulings

Springville Manuf. Co. v. Lincoln.

of the learned trial justice on the admission or exclusion of evidence taken upon the trial is that relating to the defendant's unsuccessful attempt to introduce, as exhibits, the flags alleged to be similar to the one used by the flagman at the time of the accident. The exclusion of these flags and the testimony relating to them did not constitute error of so grave a character as to entitle the defendant to a new trial. The flags sought to be introduced were not the only means available to the defendant for the purpose of illustrating the one used by defendant's flagman when the collision complained of occurred; and they cannot, therefore, be said to have been material and necessary instruments of evidence for the defense.

The judgment should be affirmed, with costs to the respondent.

BOOKSTAVEN, J., concurred.

Judgment affirmed, with costs.

THE SPRINGVILLE MANUFACTURING COMPANY, Plaintiff,
against LOWELL LINCOLN, as Substituted Assignee of John
F. Plummer & Co., Defendant.

(Decided June 16th, 1890.)

The compensation agreed to be paid by a principal to factors for selling goods and guaranteeing payment was a commission on the sales, a certain part of which was for guaranteeing prompt payment by the purchasers. *Held*, that such *del credere* commission was earned when the guaranty was made.

By the agreement for consignment of the goods, the proceeds of the sales were to be remitted "from time to time;" but the factors neglected to remit promptly such proceeds collected by them, and, becoming insolvent, made an assignment for benefit of their creditors. *Held*, that their failure to remit was not equivalent to embezzlement, and did not deprive them of their right to commissions; but that the principal was entitled, as against the assignee, to have such commissions set off against the amount due from the factors.

CASE submitted on statement of facts agreed upon without action.

Springville Manuf. Co. v. Lincoln.

The facts are stated in the opinion.

Strong & Cadwalader, for plaintiff.

William B. Hornblower and *James Byrne*, for defendant.

BOOKSTAVEN, J.—The Springville Manufacturing Company is a corporation organized under the laws of the State of Connecticut, and engaged in the manufacture of cloths and woollens. Between the 1st day of January, 1886, and the 19th day of March, 1890, the firm of John F. Plummer & Co. of the City of New York were engaged in business as commission merchants, and on or about the 1st day of January, 1888, that firm entered into an agreement with the Springville Manufacturing Company whereby the company was to ship and consign goods manufactured by them to said firm as its factors for sale for the account of the company; the proceeds of such sales were to be remitted from time to time, and prompt payment of all sales was guaranteed by the firm. As compensation for such services it was agreed that John F. Plummer & Co. should receive a commission of six per cent. upon the sales made by the firm, which commission was understood to be made up of $3\frac{1}{2}$ per cent. for selling the goods, and $2\frac{1}{2}$ per cent. for guaranteeing prompt payment by the purchasers, and there was to be paid by the company an additional one per cent. for all other expenses except freight.

On the 19th of March, 1890, the firm of John F. Plummer & Co. executed a general assignment of its property to Jeremiah P. Murphy for the benefit of its creditors, which was duly recorded on the same day.

Between the date of the agreement of the original parties and the date of the assignment, the company from time to time shipped and consigned goods manufactured and owned by it to the firm as its factors or commission merchants for sale pursuant to that agreement, and proceeds of such sales were from time to time paid by the firm to the Springville Company.

At the date of the assignment, however, the firm had received and sold in its own name, for the account of the com-

Springville Manuf. Co. v. Lincoln.

pany, consigned goods to the amount of \$160,489.89, no part of which had been remitted to the latter, and of which \$111,971.42 had not been paid by the purchasers thereof, but was due or to become due from them. The firm had collected \$48,468.47, which they had appropriated to their own use, and had not paid to the company. No advances had been made by the firm upon the goods or their proceeds. The unpaid commissions upon sales amounted to less than the sum received by the firm.

The firm of John F. Plummer & Co. was, at the time of the assignment, largely insolvent. The inventory filed by the assignee disclosed assets of the nominal value of \$1,020,781.01, and of the actual value of \$68,803.44, and liabilities to the amount of \$877,605.32, including the amount of \$48,468.47 due the company as before mentioned.

After the execution of the assignment, the Springville Manufacturing Company claimed the right to collect the unpaid amount of \$111,971.42, whereof portions were paid by check or draft to the order of John F. Plummer & Co., and in such instances required the assignee to indorse and deliver such checks to the plaintiff, under the power of attorney contained in the assignment. The assignee refused to do so, claiming the right to deduct from such amounts the commission of seven per cent. to which the firm of J. F. Plummer & Co. would have been entitled under the agreement. On the other hand the company claimed that, the firm having become insolvent, the guaranteed commission was not chargeable, but only the commissions for sale and expenses; and that, whether or not the guaranteed commission had been earned, all commissions should be offset and credited against the indebtedness of the firm to the company. In order to bridge over the difficulty, an agreement was entered into bearing date the 26th of March, 1890, by which it was provided that the assignee might deduct from all collections made by him, on account of such sales, the commissions to which the firm would have been entitled if it had continued in business, and deposit them in the Manhattan Trust Company to be held subject to the determination of the right of the assignee to

Springville Manuf. Co. v. Lincoln.

retain the same or any part thereof; or of the company to receive the same or to offset the same against the indebtedness of the firm. Afterwards the assignee, from time to time, received moneys on account of such sales by checks to the order of J. F. Plummer & Co., or otherwise, and deducted therefrom various amounts as commissions at the rate of seven per cent., and deposited them in the Manhattan Trust Company, in the City of New York, to the joint order of himself and the company. The amount so deposited is \$2,648.43.

On the 28th of April, 1890, this court, at a Special Term, discharged Jeremiah P. Murphy as assignee, and Lowell Lincoln, the defendant herein, was duly appointed substituted assignee, and qualified as such on the 29th of April, 1890, by filing his official bond, which was approved by one of the Judges of this Court. On the 2d day of May, 1890, Murphy, with the assent of the Springville Company, assigned unto the present defendant all the title and interest which he, as assignee or individually, had, in and to the said sum of \$2,648.43, together with power to collect and receive the same in the same manner and subject to the same conditions as he (Murphy) was subject to under the aforesaid agreement.

This controversy is submitted, on this state of facts, for the purpose of determining the right of Lincoln, as substituted assignee of John F. Plummer & Co., or the Springville Manufacturing Company, to the moneys so deposited.

The first question submitted is as to the right of the assignee to any commissions whatever. From the foregoing facts it appears that the firm of John F. Plummer & Co., before the assignment, had made sales to the amount of \$160,439.89, and had collected \$48,468.47, which they had not remitted to the plaintiff. On the argument it was virtually conceded that the 4½ per cent. commission had been earned by the firm, but it was contended that the 2½ per cent. for guaranteed sales could not be allowed because the firm had become insolvent before the accounts were collected. But, we think, by the mere fact of making a sale, the firm became liable as guarantor to the plaintiff, and that its subsequent insolvency in

Springville Manuf. Co. v. Lincoln.

no way relieved the estate from that liability, and the plaintiff has a right to look to and to be paid the whole amount due it from the assigned estate, provided sufficient is realized therefrom to do so, or if not, then to its *pro rata* share upon the whole amount, whether the money is collected from the parties to whom the sales were made or not. The infirmity of the plaintiff's argument is that it assumes that the *del credere* commission of 2½ per cent. is not earned until the collection of the account or the payment of the account to the assignor. We think it is earned when the guaranty is made, not when it is performed. It is true that by their insolvency such a guaranty becomes of less value than it otherwise would have been, but that cannot alter the legal status of the parties.

We are, therefore, of the opinion that the entire seven per cent. commissions were earned, unless plaintiff's contention that the misconduct of Plummer & Co., in not remitting promptly the moneys collected by them and appropriating the same to their own use, deprived them of the right to any commissions whatever.

There can be no doubt but that where a factor has been guilty of embezzlement, fraud, false representation, or other gross misconduct, he forfeits all claim to commissions. But it is not every such dereliction of duty that has such a penalty attached. In the statement of facts it is admitted that certain amounts had been collected by Plummer & Co. before its failure, and not remitted to the plaintiff, but appropriated to its own use. But we do not think that this is equivalent to embezzlement, as claimed by the learned counsel for the plaintiff. If the plaintiff and Plummer & Co. stood in a fiduciary relation to each other, or a personal trust existed between them, then such appropriation would amount to embezzlement. But, ordinarily, the relation between a factor and his principal is not of a fiduciary nature, and does not involve a personal trust, and this distinction has been repeatedly pointed out (*Merrill v. Thomas*, 7 Daly 396; *Stoll v. King*, 8 How. Pr. 298; *Sutton v. DeCamp*, 4 Abb. Pr. N. S. 483; *Clark v. Pinckney*, 50 Barb. 226; *Duguid v. Edwards*, 32 How. Pr. 254). In this case

Springville Manuf. Co. v. Lincoln.

there is nothing to show that any personal trust existed, or that Plummer & Co. were bound to remit, immediately upon collection, the proceeds of sales made on plaintiff's account. On the contrary, it is admitted "that the proceeds of such sales were to be remitted to the said Springville Company from time to time." This, we think, negatives the idea of an immediate remittance, and authorizes the inference that it was justified in mingling the proceeds with other funds, and we do not think it possible to have carried on the business without so doing, unless the course had been pursued which was followed in the case of the Hockanum Company, a decision which will be announced herewith.

Besides this, the plaintiff, when it had it within its power to compel an instant compliance with its agreement, allowed the proceeds of sales to accumulate in Plummer & Co.'s hands, and for that reason we think it must be held to have acquiesced in such a treatment of its funds. This case is not analagous to *Boston Carpet Co. v. Journey* (36 N. Y. 384), for in that case it was held that the accounts rendered were, in effect, fraudulent, which is not claimed in this action. We, therefore, think that the firm of Plummer & Co. had earned their commissions.

But such commissions were only a debt due from the plaintiff to Plummer & Co. as factors, for the payment of which the law gave a lien as additional security to the latter; in all other respects the commissions were subject to the incidents of an ordinary debt, including set-off, and payment of them can be properly made by setting off the amount of the commissions *pro tanto* against the larger amount due by the firm to the plaintiff. An assignee for the benefit of creditors can obtain no greater right than his assignors had. In this case, had Plummer & Co. not made an assignment, and had there been an accounting between that firm and the plaintiff, there can be no doubt but that the latter would have been allowed to set off the commissions against the general indebtedness of the former to it; and where a set-off could have been enforced against the assignor, it will be directed against the assignee. A court of equity, especially where one of the cross-debtors

Springville Manuf. Co. v. Lincoln.

is insolvent, will always interfere, setting off one debt against the other (*Schieffelin v. Hawkins*, 1 Daly 289; *Francklyn v. Sprague*, 10 Hun 589; *Coates v. Donnell*, 48 N. Y. Super. Ct. Rep. 46; *Littlefield v. Albany County Bank*, 97 N. Y. 581; *German Bank v. Edwards*, 53 N. Y. 544; *Smith v. Felton*, 43 N. Y. 423).

In the latter case the court says: "It is enough that justice and equity demand that the debts should be set off against each other rather than the defendants should be made to pay the note and rely upon the estate of an insolvent debtor for the payment of the debt due them."

The learned counsel for the defendant contended that the right to commissions was a property right, and not a mere cause of action *in personam*. Even if this were so, the right is subject to set-off, as above shown, and under these authorities we think it extremely doubtful whether Plummer & Co. could have made any conveyance which would have been effective to cut off plaintiff's right to set off such commissions against the firm's general indebtedness to it. But it is unnecessary to further discuss that question, as no such conveyance was attempted by them.

There is another reason why such set-off should be directed in this case. The proceeds of the sales of plaintiff's goods unpaid at the date of the assignment belonged to the plaintiff and did not pass by the assignment (*Wallace v. Castle*, 14 Hun 106; *Moore v. Hillabrand*, 37 Hun 491; *Converseville Co. v. Chambersburg Co.*, 14 Hun 609; *Baker v. New York National Bank*, 100 N. Y. 31; *Sherwood v. Stone*, 14 N. Y. 267; *Com. Nat. Bank v. Heilbronner*, 108 N. Y. 439). And the plaintiff was justified in making collections of the proceeds of its own goods, notwithstanding the fact that such sales were made by the insolvent firm in its own name. And where the proceeds came into the hands of the assignee, the plaintiff was entitled to have them paid over to it forthwith, and the right that the factor had to mingle such proceeds with the general fund of the estate did not belong to the assignee (*Merrill v. Thomas, supra*).

We are, therefore, of the opinion that in this case commis-

Hockanum Co. v. Lincoln.

sions from the plaintiffs are due the substituted assignee; that he is entitled to credit for so much of the commissions as were allowed for guaranteeing payment upon collections; but that the plaintiff is entitled to set-off and credit all commissions due said firm or its assignee, against the amount due from Plummer & Co.

Judgment is ordered accordingly, without costs to either party as against the other, as agreed upon by the parties hereto.

LARREMORE, Ch. J., concurred.

Judgment accordingly.

THE HOCKANUM COMPANY, Plaintiff, *against* LOWELL LINCOLN, as Substituted Assignee of John F. Plummer & Co., Defendant.

(Decided June 16th, 1890.)

By the agreement for consignment of goods for sale to factors, who were to guarantee prompt payment of the amount of all sales made by them, all sales and entries relative thereto were to be kept by the factors in separate books, and they were to collect the accounts and remit the same upon the respective dates of maturity, such remittances to be made daily, unless the amounts received were less than \$1,000, and payments made before maturity were to be remitted, less discount for anticipation of payment; and the factors' charges and commissions were to be paid by the principal within six days of receipt of bills for the same. *Held*, that the factors were entitled to commissions only on proceeds actually remitted.

CASE submitted on statement of facts agreed upon without action.

The facts are stated in the opinion.

Strong & Cadwallader, for plaintiff.

William B. Hornblower, for defendant.

Hookanum Co. v. Lincoln.

BOOKSTAVEN, J.—The questions presented for determination in this case are the same as were presented in that of the Springville Manufacturing Company against the same defendant, and argued and submitted at the same time; but differ in this important particular. The Springville Company had only the usual agreement between principal and factor, while the plaintiff, a corporation organized under the laws of the State of Connecticut, had a written agreement with Pomeroy & Plummer, the predecessors of John F. Plummer & Co., entered into on the 2d of January, 1884, by which the plaintiff agreed to consign goods for sale to Pomeroy & Plummer, and to pay that firm, as compensation for its services in making such sales, a commission of six per cent. upon the amount thereof after deducting returned goods, and the further sum of one per cent. for all other expenses except actual freights, and to make payment of said charges and commissions within six days of receipt of bills for same.

Pomeroy & Plummer among other things agreed to act as commission merchants for plaintiff, to receive and sell its goods, and guaranteed to the plaintiff the prompt payment of the amount of all sales made by them. They also agreed that all sales of plaintiff's goods and all entries relative to the same should be kept by them in *separate books of account*, which books were to be the property of the plaintiffs, and to contain a complete record of all transactions. They further agreed to collect the amount of all accounts sold, and remit the same, upon the respective dates of maturity, by check to the treasurer of the plaintiff; such remittances were to be made daily, unless the amounts received were less than one thousand dollars, in which case the remittance might be delayed until it reached that sum. They also agreed that the guaranty made by them should include and cover the time of payment of all accounts sold on credit, and if the accounts were not met by the parties to whom sold on their respective dates of maturity, the firm agreed to pay and remit for the same upon the said dates of maturity or not later than six days thereafter; if Pomeroy & Plummer received payments from parties to whom goods were sold before the date

Hockanum Co. v. Lincoln.

of the maturity of such payments, they were to remit the same promptly when received, deducting therefrom the usual discounts for anticipation of payment only. The agreement contained other provisions about forwarding weekly sketches of sales, monthly payments, trial balances, and so on, which it is not material now to consider.

When John F. Plummer & Co. succeeded to Pomeroy & Plummer on or about the 2d day of January, 1885, this agreement was continued in force in every respect as between the plaintiff and the firm of Plummer & Co.

This agreement expressed in terms as strong as the English language is capable of, that Plummer & Co. were to remit all the proceeds of sales to the plaintiff with the exception of discounts, and their commissions were not to be deducted by them from the amounts of sales, but were to be remitted to them by the plaintiff within six days after receiving bills therefor. Thus by express agreement no lien could attach to the proceeds of sales, nor was the firm entitled to commissions until such remittances were made. It therefore follows that Plummer & Co. were only entitled to commissions upon such proceeds as were actually remitted to the plaintiff, and were not entitled to any commissions upon the proceeds not remitted.

The case does not show whether any of the \$18,000 of commissions claimed by the assignee as earned, were upon goods the proceeds of which had been remitted to the plaintiff, and if such be the fact the assignee should be allowed commissions upon such remittances to be offset against the general indebtedness, as pointed out in the Springville Manufacturing Company's case, provided Plummer & Co. were not acting in a fiduciary relation to the plaintiff. But as we have not any data from which to determine the amount of such commissions, it follows that all of the questions submitted to the court for decision should be answered in the negative; that is to say: No commissions whatever, as far as appears from the case, are due from the plaintiff or collectible by the assignee of Plummer & Co. on sales made by defendant's said firm since January 1st, 1890; and the assignee is not entitled

Willetts v. Hatch.

to the guarantee commissions upon the sales made after January 1st, 1890; and there is nothing due the assignee to be set off against the amount due the plaintiff from Plummer & Co.

Judgment is ordered accordingly, without costs to either party as against the other, as agreed upon by the parties hereto.

LARREMORE, Ch. J., concurred.

Judgment accordingly.

JOHN T. WILLETTS *et al.*, Respondents, *against* ORIMEL C. HATCH, Appellant.

(Decided June 16th, 1890.)

Where a pledgee, although having, by the indorsement and delivery to him of a warehouse receipt for the goods pledged, the right to the exclusive and absolute control thereof, does not claim or exercise that right, if the pledgor, having free access to the goods, and knowing that they are in danger of damage, does nothing to preserve them or to make the damage as little as possible, though having opportunity to do so, he cannot hold the pledgee responsible for the loss thereby caused.

APPEAL from a judgment of this court entered on the verdict of a jury and from an order denying a motion for a new trial.

The facts are stated in the opinion.

John H. Post, for appellant.

W. M. Fowell, for respondents.

BOOKSTAVEN, J.—This action was brought to recover a balance for money loaned the defendant, amounting to \$2,117.38, with interest. On the trial the defendant admitted plaintiff's claim, but insisted on an offset of \$1,703.38 under a

Willetts v. Hatch.

counterclaim set up in the answer, wherein it was alleged that certain wet-salted calf skins, pledged to plaintiffs as collateral security for the loan, had become damaged to the last-named amount through the neglect of the plaintiffs to properly care for and preserve them while under their custody and control.

There is no real dispute as to the facts in this case. When the loan was made in July, 1886, the skins, although in the port of New York, were not actually warehoused. By plaintiffs' direction and with defendant's acquiescence, they were sent to the warehouse of Schultz, Innis & Co., in Cliff Street, the same warehouse in which defendant had before stowed other skins belonging to him. Schultz, Innis & Co., upon receiving the goods, issued a negotiable warehouse receipt therefor to the defendant, who indorsed it in blank, and delivered it to the plaintiffs as collateral security for the loan, and they retained possession of it. But the warehousemen, during all the time the skins remained in their possession, treated the defendant as the owner, and addressed all communications relating to them to him. The skins remained in that warehouse until July 22d, 1887, when they had become so badly damaged that Schultz, Innis & Co. ordered them to be removed from their store. They were then brought by defendant's cartman to plaintiffs' store or cellar, and in order to enable the defendant to do so, the plaintiffs gave him the warehouse receipt, which was afterwards returned to them. While in their store the skins were cared for by defendant's men under his direction. Afterwards, defendant directed the plaintiffs to sell them, which, as soon as possible after receiving such direction, they did, to a man in Easton, Pa. The price first agreed upon was \$700 cash, but, when the goods were examined at Easton, they were found so bad that the purchaser refused to pay that price, and threatened to send them back, whereupon the plaintiffs agreed to take \$400 for them, that being the best price which could be realized. No actual negligence is charged against the plaintiffs, but appellant claims that because the respondents held the warehouse receipt, which gave them the absolute custody and control of

Willetts v. Hatch.

the goods, they were bound to exercise ordinary care and prudence in looking after the skins and preventing damage to them, and are liable because they did not.

No rule of law is better settled than that a pledgee, when he has exclusive possession and control of the pawn, is bound to use ordinary diligence in the care and preservation of it. It is equally well settled that the indorsement and delivery of a warehouse receipt, either in blank or to the pledgee, gives him the right to the exclusive and absolute control of the goods pledged, if he chooses to exercise that right; and it is on these rules that the defendant relies for a recovery on his counter-claim.

But there is no evidence in the case that plaintiffs ever claimed or exercised the right of exclusive possession or absolute control given them by law. On the other hand, it appears that the defendant saw the skins on the dock, examined them as they went into the warehouse of Schultz, Innis & Co., and made a thorough examination of them in the warehouse, and found them in good condition. After that, he had free access to them, tried to sell them, and often took persons there for that purpose, and showed them to such persons. He testifies that he saw them at least once a week during every month down to April, 1887, and did not discover any evidence of damage; that they were doing well until he became ill, in April. He did not again see them until the latter part of May, 1887, when he found them beginning to heat, but he did not report this to the plaintiffs until some time in June. He then notified them of the fact, and apparently expected them to actively engage in preventing further deterioration, simply because they were pledgees, although he, the owner of the goods, did absolutely nothing to preserve them, notwithstanding he had free access to them, and, as far as appears from the testimony, could have re-salted or aired them. They were left by him in the condition in which he found them, although notified by the warehousemen they were being injured, merely giving the letter containing such notification to the plaintiffs, as if they had the sole duty to look after them and he had none. They were not finally removed until ordered

Willetts v. Hatch.

- away by Schultz, Innis & Co., when he removed them to plaintiffs' cellar, which was the first time they ever saw them or had actual custody of them; and even then they gave him the fullest liberty to do whatever he thought necessary to arrest decomposition. It is true that meanwhile he requested the plaintiffs to have them tanned on their own account. He also requested that the skins should be removed to his own storehouse, and in that event he offered to give his own warehouse receipt for them. But it is clear that it is not a pledgee's duty to tan hides in order to preserve them, and the latter request required a greater confidence in human nature as it is to day, than the plaintiffs were bound to exercise.

Again, the defendant testified that the 458 bundles of skins in question were piled in one compact mass, and that the tops of the bundles would naturally be cool when they were exposed to the air, while the middle and bottom of the mass "might be red hot so it would burn the strings off," and one would not discover it until he attempted to get to the bottom of the pile, and for that reason it is necessary to turn the pile bottom side up in order to keep rot from the lower part of the mass, and because that was not done he assigns as a reason why he did not discover the fermentation before, and which had probably been going on for some time. But he swears he made no attempt to turn the mass bottom up; that he never did more than take one bundle up at a time to show customers, as he was generally in a hurry. We think it was quite as much his duty to do this work, when he had the right and power to do it, as it was incumbent upon the plaintiffs, and their neglect was certainly no greater than his own. Even if it were the duty of the pledgees to use ordinary care under the circumstances above mentioned, and they failed to do it, it was equally the duty of the pledgor, when he knows the danger, as he did in this case, to make the damages as little as possible to his own property. The law does not permit him to sit by with folded hands, seeing the danger and doing nothing to avert it, when he had the power to do so.

At the close of the testimony, the defendant asked the court to direct a verdict for the plaintiffs, less the amount of de-

Willetts v. Hatch.

defendant's counterclaim of \$1,703,75, for damages arising, as he claimed, from plaintiffs' neglect of duty. This was upon the theory that the mere warehouse receipt gave the plaintiffs exclusive possession and control of the hides in question, and carried with it the right to damages for any neglect on their part to exercise ordinary prudence in the care of the skins. But, as before shown, plaintiffs never claimed to exercise this right, and the defendant had freer access to the goods, and a greater opportunity to care for them than they had, and we think the court very properly refused to give such direction. To have done so would have put a premium upon defendant's negligence, and, in effect, would have enabled him to sell the skins to the pledgees at a price greater than he had been able to obtain for them in the open market, as he had been more than a year trying to sell them.

Had the plaintiffs requested the direction of a verdict in their favor, it would have been probably granted, as there was only a question of law involved upon the undisputed facts in the case. But, in the absence of such a request, the case was properly submitted to the jury, the court charging them, among other things, that the plaintiff had the warehouse receipt, and had the legal or constructive possession or custody of the skins, but did not have the actual custody of them; and the question that it left to the jury was: "Were they bound, any more than the pledgor or borrower, to care for these goods, that is, to do the salting or ventilating, or any other thing that was necessary to be done to them? Did they assume, when they loaned the money upon the warehouse receipt, to do those things, which the defendants say they ought to have done, to the skins? If they did, and if they neglected any duty to them, then they would be responsible. If they did not, then they would not be responsible." This, we think, was entirely proper under the circumstances, and as favorable to the defendant as he could have asked. The jury rendered a verdict in favor of the plaintiffs, and, we think, with justice.

On the trial, the defendant, relying upon his theory as above set forth, and the absolute liability of the plaintiffs by reason

Woarms v. Bauer.

of their holding the warehouse receipt, endeavored to exclude evidence tending to show that the plaintiffs never had the actual possession of the calf-skins until they came to their store in July, 1887; but, we think, in view of the facts before stated, the court properly admitted such evidence, and it was pertinent to the issues then to be tried. So, too, and for the same reason, the court properly admitted evidence tending to show that the plaintiffs had no notice of the condition of the skins up to a certain date.

The court did not err in allowing the amendments to the reply to conform to the proofs.

The other exceptions argued before us were based upon the erroneous theory contended for by the defendant, and were not well taken.

The judgment should therefore be affirmed, with costs.

LARREMORE, Ch. J., concurred.

Judgment affirmed, with costs.

ALBERT L. WOARMS and LOUIS J. LESSER, Individually, and
ALBERT L. WOARMS *et al.*, as Executors of David S. Hess,
Deceased, Respondents, *against* MORITZ BAUER, Appellant.

(Decided June 16th, 1890.)

Articles of copartnership contained an agreement that, in the event of the death of a certain one of the partners before the expiration of the term of the copartnership, his interest therein should survive to his personal representatives and the business should be continued by them and the other partners as copartners. During the term of the partnership, such partner died, leaving a will by which he directed his executors to carry out this agreement. *Held*, that the agreement was valid, and the defendant in an action for a debt due to the firm could not object that the executors were improperly joined as plaintiffs.

Upon trial of an action on the pleadings, the sole question being the sufficiency of a defense of misjoinder of parties plaintiff set up by answer, judgment was rendered for plaintiffs. *Held*, on appeal therefrom, that, the

Woarms v. Bauer.

decision being correct, the judgment would not be reversed merely to enable defendant to apply to the court below for leave to amend, as on trial of a demurrer; no request therefor having been made in the trial court.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered upon trial of an action on the pleadings.

The action was brought to recover for work and labor performed for the defendant by the firm of D. S. Hess and Company. The complaint, after setting forth the doing of the said work, alleged that, by virtue of the articles of the copartnership of the firm, it was mutually agreed that in the event of the demise of D. S. Hess, one of the members, before the expiration of the stipulated term of partnership, his interest as a partner in said firm should survive and accrue to and be continued by his personal representatives, and that said business should be continued by the other partners and the said representatives as copartners. It further alleged that, before the expiration of the said stipulated term of partnership, and before the commencement of this action, Hess died, leaving a will, by which the plaintiffs, Albert L. Woarms, Martin S. Fecheimer, and Sarah Hess, were appointed as executors thereof and were directed to carry out the provisions of the copartnership articles aforesaid; that letters testamentary had been issued to the said executors, that they qualified as such executors and entered upon the discharge of the duties of their office, and carried out the aforesaid provisions of the copartnership articles of the firm of D. S. Hess and Company, as directed by the same.

The answer denied the value of the work, labor, and services claimed, and further answering, and as a separate and distinct defense, alleged a misjoinder of parties plaintiff.

The cause came on for trial in the City Court and was duly submitted upon the pleadings, the sole question raised being the sufficiency of the defense of misjoinder of parties plaintiff. Judgment was given for the plaintiff for the whole amount claimed, and was affirmed on appeal to the General Term of

Woarms v. Bauer.

the City Court; and from that decision defendant appealed to this court.

Donohue, Newcombe & Cardozo, for appellant.

M. A. Lesser, for respondents.

J. F. DALY, J.—[After stating the facts as above.]—The only question in the case is, whether the personal representatives of a deceased partner may be joined as parties with the surviving partners, in an action upon a debt due the original copartnership, where such personal representatives are directed by their testator, in his last will and testament, to continue with the survivors the business of the copartnership pursuant to the provisions of the original articles, which stipulated that in the event of the death of the testator his interest as partner should survive and accrue to and be continued by his personal representatives and the other survivors.

There seems to be no possible objection to such a course. While the rule is that, in the event of the death of a partner, the survivors "succeed primarily to all the rights and interest of the partnership and have the entire control of all the partnership property and the sole right to collect partnership dues" (*Voorhis v. Child*, 17 N. Y. 354), yet the rule is not applicable where, by agreement among the copartners, the interest of any one of them who dies, survives, accrues to, and is continued by his personal representatives as copartners.

It is perfectly competent for copartners to make such an agreement, and for one of them to direct in his last will and testament that it be carried out by his personal representatives, and for the surviving partners and such representatives to act under such agreement (*Lane v. Arnold*, 11 Daly 293). When such personal representatives are admitted by the other copartners to continue the business as succeeding to the rights and interest of the deceased, the survivors thereby waive their right to the exclusive control of the co-

Woarms v. Bauer.

partnership property and their succession to all the rights and interests of the partnership, and necessarily waive their exclusive right to collect the copartnership dues. The latter right to collect and sue for the partnership debts grows out of the exclusive right to possession and control of the copartnership effects, and if the latter right be waived and the representatives of a deceased copartner are admitted to a share in it, they are also admitted to the right of collection and suit. The question is one wholly in the discretion of the surviving partners, and the debtors of the firm have no ground of complaint. The defendant, therefore, cannot object to the joining of the representatives of the deceased partner with the surviving partners in this action, and the only question litigated in the court below was properly disposed of.

Upon this appeal the point is made that, as the trial was upon the pleadings, the defendant should have had leave to amend as upon the decision of a demurrer, and that the judgment should be reversed. No request for leave to amend was made in the City Court, and there is nothing for us to review upon that head. The only point submitted to the court at the trial was the alleged misjoinder of parties plaintiff, the denials in the answer having been apparently waived. Had an application for leave to amend been made, it would have been granted. It seems now to be suggested for the first time without the City Court having had the opportunity to pass upon it. As it was a matter within the discretion of that court, the application to us cannot be entertained; and the judgment cannot be reversed in order to permit such application to be made in the City Court.

The judgment should be affirmed, with costs.

LARREMORE, Ch. J., and BISCHOFF, J., concurred.

Judgment affirmed, with costs.

Demarest v. Flack.

**FRANCES E. DEMAREST, Plaintiff, against JAMES A. FLACK
et al., Defendants.**

(Decided June 26th, 1890.)

In an action against several defendants for personal injuries to plaintiff sustained on a toboggan slide, the only evidence that defendants were jointly interested in operating the slide was testimony that the ground was let to one of them for a company as tenant ; that another defendant paid for services rendered in the construction and operation of the slide, by checks as treasurer of the company ; and that other defendants inspected toboggans and other goods, and ordered them sent to the slide. *Held*, that this was insufficient to charge defendants with liability as partners.

A certificate of incorporation was duly issued to residents of New York, under the statutes of West Virginia, which provided that, from the date of such a certificate, the incorporators named shall "be a corporation by the name and for the purposes and business therein specified." The business specified was thereafter conducted by them in the usual methods. *Held*, that subsequent irregularities of action and failures to comply with requirements of statutes of West Virginia, especially with a provision that every director must be a resident of that state unless otherwise provided by a by-law, no such by-law being shown, did not render the incorporation nugatory, so that the stockholders might be treated as partners and as such liable for personal injuries caused in the prosecution of the business of the company.

EXCEPTIONS taken at a trial term of this court ordered to be heard in the first instance at the General Term.

The facts are stated in the opinion.

Seaman Miller, for plaintiff.

W. Bourke Cochran, for defendants.

LARREMORE, Ch. J.—This is an action for damages for personal injuries sustained by the plaintiff upon a toboggan slide on January 20th, 1888. The premises upon which said slide was situated were owned by the New York Driving Club. The complaint alleges that the defendants "were a joint-stock company, doing business in the city of New

Demarest v. Flack.

York under the name and style of 'America's Winter Carnival Company,' and that said defendants were and still are the owners thereof." No proof, however, was offered to show that the defendants had organized or constituted a "joint-stock company," as that term is understood under the statutes and adjudications of the state of New York. Even if such proof had been made, as the number of persons composing the alleged "joint-stock company" would have been less than seven, such allegation would have had little legal significance, because plaintiff would have been obliged, as she has done, to sue the members thereof as partners, and not to sue the alleged company in the name of its president (Code Civ. Pro. § 1919). In any view of the matter, therefore, it was incumbent upon the plaintiff, in order to maintain this action, to show that the defendants were jointly interested in operating the toboggan slide upon which the accident happened. Even making all possible allowance for the difficulty under which the plaintiff labored, in being compelled to call hostile witnesses for proof on this point, we cannot hold that a *prima facie* case was made out. The witness Jones testifies that, if he remembered rightly, these grounds were let by the New York Driving Club for the purpose of putting up these toboggan slides, to the present defendants. On cross-examination, however, he says that the only one of them who personally agreed with him as secretary of the New York Driving Club, or with the executive committee thereof, to take the place, was the defendant Case. He further avers, that "the America's Winter Carnival Company was the tenant which had possession of those grounds on which ran this toboggan slide;" that he regarded himself as an employe of that company; and that he was paid for his services as manager thereof by the check of Mr. de Cordova, as treasurer of the Winter Carnival Company.

The testimony of the witness Grant is to the effect that the America's Winter Carnival Company constructed toboggan slides in Fleetwood Park; and that he was a stockholder in such corporation. The fact that the defendants Case and Grant inspected toboggans and other goods, and ordered the

Demarest v. Flack.

same to be sent to Fleetwood, is not sufficient to charge them with liability either individually or as partners with their co-defendants. Such acts on their part might have been performed as agents for and in the interest of America's Winter Carnival Company. It appears that for the services of the witness Cook as civil engineer in drawing the plans and specifications for the slides, he also was paid by a check signed by Mr. de Cordova as treasurer. Even if no evidence of incorporation had been introduced, we should have been obliged to hold that the record discloses no facts from which a jury would have been authorized to find a liability as partners, for any debts contracted or damages sustained in the operation of said slides.

But it does appear that a certificate of incorporation was filed under the laws of the state of West Virginia on or about the 12th day of December, 1887, and that these defendants became stockholders in the company so formed. The Code of West Virginia is in evidence, and, in section 10 of chapter 54 thereof, provides that "When a certificate of incorporation shall be issued by the Secretary of State, pursuant to this chapter, the corporators named in the agreement recited therein, and who have signed the same, and their successors and assigns, shall, from the date of the said certificate until the time designated in the said agreement for the expiration thereof, unless sooner dissolved according to the law, be a corporation by the name and for the purposes and business therein specified." It also appears that the Secretary of State of West Virginia issued under the Great Seal of said state the certificate provided for by section 9 of chapter 54 of said Code, which officially declared the America's Winter Carnival Company to be, from said 12th day of December, 1887, a corporation, to be known by said name, and to exist for the purposes set forth in the said certificate or agreement. In *Methodist Episcopal Union Church v. Pickett* (19 N. Y. 485), it was held that "Two things are necessary to be shown in order to establish the existence of a corporation *de facto*, to wit: (1) the existence of a charter or some law under which a corporation with the powers assumed might lawfully be

Demarest v. Flack.

created; and, (2) a user by the party to the suit of the rights claimed to be conferred by such charter or law." We think the defendants have established both the presumptive legislative organization and the user prescribed by the case cited. It is argued that the America's Winter Carnival Company is not a legally existing corporation, of which the courts of this state can take cognizance, because of alleged irregularities of action, and failure to comply with statutory requirements, on the part of the corporation and its directors and officers. The point is especially insisted on, that, as the Code of West Virginia prescribes that every director must be a resident of that state, unless it is otherwise provided by a by-law, and as all the directors of said company are residents, not of West Virginia, but of New York, and no by-law authorizing this innovation is shown, the attempted organization is nugatory, and the would-be stockholders must be treated merely as partners. But, outside of the language of section 10 of chapter 54 above quoted, which expressly provides that from the date of the certificate the signers thereof and their successors shall be a corporation, we are of opinion that well-settled rules of law, in this as well as other states of the Union, would defeat plaintiff's contention. In the early and well-known case of *The People v. The Manhattan Company* (9 Wend. 351), it was held that, although incorporation had been granted upon condition that the company should within ten years furnish a supply of pure water to such persons as chose to avail themselves of the same, and the time so provided had expired, the proviso was not a condition precedent but a defeasance; that the corporation had come into being and still existed, and that, therefore, it was not compelled to set forth the condition and allege performance thereof, even to show a present right, as in judgment of law a corporation once shown to exist is presumed to continue until the contrary is shown.

In *Eaton v. Aspinwall* (19 N. Y. 119), it was held that a defect in the proceedings to organize a corporation is no defense to a stockholder in a suit to enforce his individual liability, he having participated in its acts of user as a corpo-

Demarest v. Flack.

ration *de facto*. Here it appeared that a certificate of incorporation had been filed under the laws of New York, but that the ten per cent. of the capital required by the general act to be paid in had not been so covered into the treasury; "yet the company elected its officers, hired an office in the city of New York, and went into actual operation there as a corporation." In the opinion it was said that "When its corporate existence had been thus established the plaintiffs would not have been permitted to prove, as a defense for them, the facts relied upon by the defendants; for the familiar reason that the right of a corporation to sue cannot be inquired into collaterally. Thus, it will be seen that this corporation, though not a valid corporation in point of law, may carry on its enterprises, have its day in court, and divide its revenue among the holders of the shares of its capital, until the state shall interpose and ask that it be dissolved; and that the only real necessity of complying with the statute in relation to the payment of the ten per cent. was to prevent proceedings in behalf of the people to put an end to its corporate functions."

This case has been largely cited in our own courts, and often quoted and followed in the tribunals of sister states. In *Palmer v. Lawrence* (3 Sandf. 161), it was held that a certificate, made and filed for the purpose of organizing a banking association, if in conformity with the terms of the act, is evidence that the provisions of the statute have been complied with, and that the company was duly organized; and, further, that a defendant, who has contracted with a corporation *de facto*, will not be permitted to allege any defects in its organization, as affecting its capacity to contract or sue, all such objections being available only to the sovereign power of the state.

In *Swartwout v. American Air-Line R. R. Co.* (24 Mich. 389), the rule was stated by COOLEY, J., as follows: "It is obvious that all questions of regularity in the proceedings on the part of the associates in taking upon themselves corporate functions, purporting to emanate from its sovereignty, are questions which concern the state rather than in-

Demarest v. Flack.

dividuals, and should only be raised in a proceeding to which the state has seen fit to make itself a party."

In a later case, in the state of Michigan, *Merchants' & Manufacturers' Bank v. Stone* (38 Mich. 779), it was held that where a body professing to be a corporation had been dealt with expressly as such, those who have so dealt with it cannot question its corporate existence for the purpose of charging its members individually as partners. See also *Stout v. Zulick* (48 N. J. L. 599); *First National Bank v. Almy* (117 Mass. 476); *Congregational Socy. v. Perry* (6 N. H. 164); *Newburg Petroleum Co. v. Weare* (27 Ohio St. 343); *Casey v. Galli* (94 U. S. 673); *Leonardsville Bank v. Willard* (25 N. Y. 575); *McFarlan v. Triton Ins. Co.* (4 Denio 392).

In *Spring Valley Water Works v. San Francisco* (32 Cal. 434), it was expressly held that omissions or irregular performances relating to the organization of a corporation can only be investigated in a direct proceeding instituted by the state for that purpose, and not in a collateral action. Especially was this thought to be the rule with regard to acts which are not made pre-requisite to the exercise of corporate powers, but which operate as a forfeiture. On this latter point see also *Mokelumne Hill Mining Co. v. Woodbury* (14 Cal. 424).

There is an overwhelming current of authority throughout the United States on the point that where a corporation has once come into actual existence through the due observance of the original formalities required for that purpose, subsequent omissions or irregularities in the completion of its organization or the prosecution of its business, shall not be available as a defense in matters of contract, either to the corporation itself or its directors or stockholders, and cannot be taken advantage of by outsiders who have had business dealings with it. We have not been able to discover any reported case in which it was attempted to raise this point in an action on *tort*; but we cannot see why the same principles should not apply. Here it is shown, that the certificate of incorporation was regularly executed and filed, and the Secretary of State of West Virginia duly certifies to such facts. User on the part

Demarest v. Flack.

of the company is shown by the testimony of all the witnesses as to the usual methods of conducting business. Within the reasoning of the authorities above cited, America's Winter Carnival Company, as far as the outside world was concerned, was a *de facto* corporation, able to contract debts, and liable for the payment thereof, as well as for all damages sustained by its customers through the negligence of its employes.

In *First National Bank v. Almy* (117 Mass. 476), which follows the general current of authority upon the point in question, it was held that when a certificate of organization had been issued by the Secretary of the Commonwealth to members of a proposed corporation in accordance with the statute, said corporators were not liable as partners by reason of having transacted business before the whole of the capital stock had been paid in, although this was in direct violation of the statute on the subject. In that case it was said by GRAY, Ch. J., that this defect would not have prevented a suit against the corporation itself, and that, therefore, the stockholders should not be held personally liable. In the case at bar the non-compliance with the subsequent statutory formalities would not have been a bar to a suit against the America's Winter Carnival Company, and the reason for exempting the stockholders from individual liability, because the remedy exists against the company itself, applies with equal force. A further consideration advanced by Chief Justice GRAY was, that the case of stockholders in a corporation which may have been imperfectly organized is not analogous to the case of a limited partnership, for the reason that in the latter instance the intention is to form a partnership of some kind, and the statute expressly provides that if the technical formalities are not observed the partnership shall be an ordinary one, and its members liable *in solido*. In that case, as in the case at bar, there was no intention to form any partnership at all, and we approve of the suggestion of the learned Chief Justice of Massachusetts that, under such circumstances, there is no statutory authority, and there would be no just ground for saddling certain stockholders with liability, the nature of which they had never contemplated.

Better v. Prudential Ins. Co.

The exceptions should be overruled, and judgment ordered for the defendants, with costs.

BOOKSTAVEN, J., concurred.

Exceptions overruled, and judgment for defendants, with costs.

MAX BETTER, Respondent, *against* THE PRUDENTIAL
INSURANCE COMPANY, Appellant.

(Decided July 18th, 1890.)

A stipulation, in a contract for employment, that no action shall be brought by the employe against the employer until ten days after service on the latter of a written statement of the particulars and amount of the former's claim, is reasonable, and the employe cannot be relieved therefrom merely because he did not understand it when he entered into it.

A stipulation, in such a contract, that no action shall be brought against the employer by reason of any matters arising thereunder after six months from the time of the termination of the employment, is authorized under section 414 of the Code of Civil Procedure, providing for a shorter limitation, by the written contract of the parties, than that prescribed by statute.

APPEAL from a judgment of the District Court in the City of New York for the Fourth Judicial District.

The facts are stated in the opinion.

H. C. Kudlich, for appellant.

John Fenrell, for respondent.

BOOKSTAVEN, J.—This action was brought to recover "money deposited as security" for plaintiff's faithful performance of his duty as a collector for the defendant.

Various grounds for the appeal were argued, but it is necessary to notice two of them only. By the terms of the agreement between the parties it was expressly stipulated

Better v. Prudential Ins. Co.

that the plaintiff should commence no action either at law or in equity until ten days after service on the president or secretary of the defendant of a written statement of the particulars and amount of the plaintiff's claim against the defendant. There is no claim that this agreement was entered into through any fraud on the part of the defendant. It was reasonable in itself, and if plaintiff did not understand it when he entered into it, it was his own fault, and this court cannot relieve him in that respect. No such notice was given, as appears from the return, until after the commencement of the action.

In the written agreement it was also expressly stipulated that no suit should be brought against the defendant by reason of any matters arising thereunder after six months after the time of the plaintiff leaving defendant's employ. It is clear from the evidence that this action was not commenced within that time. Plaintiff's counsel claims that such a limitation is not valid in view of the general statutes in relation to the limitation of actions, but we cannot agree with him. By section 414 of the Code of Civil Procedure, it is expressly provided that a shorter time may be agreed upon by a contract in writing. And in *Wilkinson v. First Nat. Fire Ins. Co.* (72 N. Y. 501-508), and cases there cited, it was held that "it was well settled, that the parties to a contract may provide for a shorter limitation to actions thereon than that fixed by the general law. Such an agreement is not expressly or impliedly prohibited by the general statute of limitations, and is consistent with the policy upon which the statute is founded."

We therefore think the judgment should be reversed, with costs to the appellant.

ALLEN, J., concurred.

Judgment reversed, with costs.

Gross v. Jancsok.

CHARLES GROSS, Respondent, *against* JOHN JANCOK, Appellant.

(Decided July 18th, 1890.)

At a sale by auction of personal property under a power in a mortgage thereof, defendant became the purchaser on a bid of \$325, after other bids, up to \$320, had been made. It did not appear that such bids were not made in good faith. The real value of the property was about \$400. *Held*, that defendant could not object to the fairness of the sale, because of a secret agreement between him and the mortgagee that he should pay \$325 for the property, and that no one else should get it.

Defendant refused to complete the purchase, and told the mortgagee to sell the property to some one else, and was thereupon told that he would be held liable for any loss on such resale. The property was then readvertised once, and sold without further notice to defendant. *Held*, that the finding of a jury that defendant had reasonable and proper notice of the resale would not be disturbed on appeal, no fraud or bias being shown.

APPEAL from a judgment of the District Court in the City of New York for the Eighth Judicial District.

The facts are stated in the opinion.

George W. McAdam, for appellant.

John Mulholland, for respondent.

BOOKSTAVEN, J.—This action was brought by the plaintiff, a vendor, against the defendant, a vendee, to recover damages on a resale of certain fixtures, etc., of a dining-room or restaurant, No. 197 Third Avenue. The property was sold at public auction under a power contained in a chattel mortgage, and at the sale the defendant, on the 5th February, 1890, purchased the whole of it for the sum of \$325 after other bids up to \$320 had been made. He paid \$5 on account of the purchase, and agreed to pay the remainder on the same day at 4 P. M. When that hour arrived, defendant refused to complete the purchase and told plaintiff's representatives "to sell it to some one else," because his wife did

Gross v. Jancsok.

not want him to take it. He was then told that if the property was resold it would be on his account, and he would be held liable for any loss on such resale.

The property was then readvertised once without further notice to the defendant, and realized the sum of \$256.42 only. Against this the plaintiff charged \$20 for a watchman for five days and nights and \$2.40 for advertising and auctioneer's fees, and credited the defendant with the net proceeds, to wit, \$208.58, and brought suit for the difference between the purchase price and the net amount realized, that is to say for \$116.12. The trial court only allowed \$4 for watchman's fees, and the jury, after a charge by the court, rendered a verdict in plaintiff's favor for \$74.98. The defendant does not dispute plaintiff's right to resell under the circumstances; but claims the first sale was not fairly conducted, the second was not made in good faith and with reasonable diligence, was not properly advertised, and defendant had no proper notice of the time and place of the resale.

As to the first objection, it appears from the evidence of the attorney for the mortgagee that the property was advertised by him to be sold at auction, and there was a secret agreement between him and the defendant, that the latter should pay \$325 for the property, and that no one else should get it, no matter what they bid for it. So far as appears from the evidence, on the sale the sum of \$320 was bid for the property in good faith, and defendant's bid was the highest offered; his private understanding with the attorney, therefore, could not affect the general public; and the fact is no bidder complained of the price at which it was sold to the defendant. Nor does it appear that the previous bid of \$320 was made by anyone employed by the plaintiff or his attorney to inflate the price and to induce the defendant to bid a higher price than he otherwise would have done, and in this respect it differs widely from *Fisher v. Hersey* (17 Hun 370).

On the contrary, the evidence shows that the property was fairly worth \$400, and this defendant's counsel claims was about its real value. The rascality of the understanding, which defendant claims was made with the mortgagee's

Gross v. Jancsok.

attorney, by which he was to get the property at public sale for \$225, was equally shared by defendant himself—he should not be allowed to avail himself of his own wrong in the absence of any deceit practised on him.

As to the second objection, that the resale was not made in good faith and with reasonable diligence, we have carefully examined the testimony and the judge's charge on that point, and find the charge was fair and impartial on that question, and the jury's finding was fully sustained by the evidence. We may say that the charge was as strongly in defendant's favor as the circumstances warranted, and the finding of the jury in such a case will not be disturbed (*Conkling v. Thompson*, 29 Barb. 218; *Coring v. Calvert*, 2 Hilt. 56; *Maguire v. Woodside*, Id. 59; *Barber v. Arnoux*, 18 How. Pr. 285).

As to the third and fourth objections, that the property was not properly advertised, and the defendant had no notice of the resale, we think there is no law prescribing what notice shall be given to a defaulting purchaser, and it was fairly submitted to the jury whether the notice in fact given was a reasonable or proper notice, and their conclusion upon that question, as before shown, is binding on us in the absence of fraud, misrepresentation, bias, or prejudice, none of which do we perceive in this case.

In the case of *Pollen v. LeRoy* (30 N. Y. 549), it was said: "A vendor, if he elects to become such, is an agent for the vendee who refuses to complete his purchase, to sell fairly and for the best advantage. The only requisite to such sale as a measure of the rights and injury of the party is good faith; there is nothing in the cases which I have found requiring more than this." In the same case it was held that, although the law regards the vendor as agent *quoad hoc* of the vendee, it is no part of his duty to notify the principal of the time and place of sale.

In *Hunter v. Wetsell* (84 N. Y. 549), it was held that the vendor might have abandoned the property and sued for the full price of the goods sold, and that he might, although he was not bound to, resell at auction.

Lathers v. Hunt.

In *Messmore v. New York Shot & Lead Co.* (40 N. Y. 429), it was held that the vendor had a right to sell at the best price he could obtain, after his offer to deliver the goods, and the law did not require him to give any notice of the time or place of sale.

In *Porter v. Wormser* (94 N. Y. 447), it was held that an agent authorized to sell property might, in the absence of restrictions, sell in any ordinary manner.

In *Bigelow v. Legg* (102 N. Y. 652), it was held that the measure of damages, in such case, is the difference between the contract price and the market value, and the price realized at auction may properly be taken into consideration in determining the market value. The fact that the property on the second sale was not sold in bulk but in detail, was in defendant's favor. The fact that the license, etc., was not tendered to the defendant, is not material in view of his positive refusal to take the property at any price.

We therefore think, in any aspect in which this case may be viewed, the judgment of the court below must be affirmed, with costs to respondent.

ALLEN, J., concurred.

Judgment affirmed, with costs.

RICHARD LATHERS Appellant, *against* JACOB H. HUNT,
Respondent.

(Decided July 18th, 1890.)

Although letters written by one person are not admissible to prove his agency for another, they may be competent against the latter as part of the *res gestæ*, where they relate to the matter in controversy, and the agency is otherwise proved.

Defendant, being indebted to plaintiff for rent, executed to him a chattel mortgage of his household goods on the demised premises. Defendant subsequently abandoned the premises and the goods, and plaintiff took possession thereof. *Held*, that his taking possession of and caring for the

Lathers v. Hunt.

goods did not constitute a conversion thereof, or an appropriation of them in satisfaction of the mortgage debt.

In an action for the rent, defendant set up such taking of the property as a defense. *Held*, that plaintiff should be permitted to show that he never used it himself or allowed others to use it, and had never reaped any advantage from its possession.

Even if there had been a conversion or appropriation of the property by plaintiff, he would only be chargeable with its value at the time, there being no evidence that he took it in full satisfaction; and, therefore, the exclusion of evidence of such value was error.

APPEAL from a judgment of the District Court in the City of New York for the Eleventh Judicial District.

The facts are stated in the opinion and in the report of the decision on the former appeal, *ante*, p. 135.

Joseph Walmsley, for appellant.

L. B. Bunnell, for respondent.

BOOKSTAVEN, J.—The action was brought by the plaintiff to recover the sum of \$150 due from the defendant for the rent of a certain flat in East 93rd Street. The answer practically admitted the rent due, but set up that the defendant, in order to secure its payment, executed to plaintiff a chattel mortgage on certain furniture and carpets then in the flat in question, that the plaintiff afterwards took possession of the same and used it, and had derived great benefit from such use, while the defendant had suffered damage by reason thereof, and sought to offset or counterclaim the damage against the rent. It also set up as a separate defense that the plaintiff had exercised his right to foreclose the chattel mortgage by assuming and exercising the right of ownership, since about the month of October, 1887, and had thereby discharged the defendant from all obligation for the rent in question.

Appellant contends that certain letters written by Richard Lathers, Jr., were improperly admitted in evidence, under the well-settled rule that the declarations of a man cannot be given in evidence to prove that he is the agent of another;

Lathers v. Hunt.

but, while they were not competent for that purpose, we think they were properly admitted as a part of the *res gestæ*, all of them having been written in relation to the matters in controversy, and his agency having been sufficiently proven by other evidence; he, and he alone, let the flat to the defendant; he collected the rent and gave receipts therefor; when the rent fell in arrear he required security, rejected certain stocks, offered and selected the furniture, etc., to be included in the chattel mortgage, had that drawn up in his own name, although there was no other debt than that for rent due either the plaintiff or the younger Lathers; and the latter must be held to have acted for the plaintiff in that matter. So, too, when the defendant was about to give up the flat, he was consulted about letting Mrs. Bryan, an inmate of defendant's family, have the same for the remainder of defendant's term, and afterwards let the same to her for a new term.

But when this case was before this court on a former appeal, we held that there was no conversion of the mortgaged property when the defendant moved out of the flat leaving it in possession of Mrs. Bryan, to whom he gave express permission to use it while she occupied the premises in his place, or afterwards, when the plaintiff let the flat to her for a new term; and on the present trial, that view is confirmed by the oral testimony given on plaintiff's behalf and the lease introduced in evidence, which clearly shows it was of the flat alone, and that the property in question simply remained as defendant had left it. After Mrs. Bryan left the flat in July, 1888, and abandoned the property, the plaintiff took possession of the flat and put the property in other and unoccupied apartments in the same or adjoining house, and sent the carpets to be cleaned. He had a right, and it was his duty, to care for the property so abandoned, and his taking such possession under the circumstances did not satisfy the debt or amount to an appropriation of the property toward that purpose, as pointed out in the opinions delivered on the former appeal; and if we were warranted in reversing the judgment then, for these reasons, defendant's

Lathers v. Hunt.

case is certainly no stronger on this appeal, and the judgment must be reversed again.

Under the opinions then delivered by the court, and the issues raised by the pleadings, it was essential that the defendant show a conversion of the mortgaged property on the part of the plaintiff or an appropriation of it to the full or partial payment of his claim. It was just as material and important for the plaintiff to present any evidence which would tend to disprove either of these facts, yet when he undertook to show that he had never so converted or appropriated it, that he had never used it himself or allowed others to use it, that he had never let it, or together with other furniture, and had never reaped any advantage from its possession, the court below on defendant's objection refused to permit him to do so, although we think such testimony went to the very gist of the defense interposed, and it was error to exclude it. It is in vain that the respondent seeks to have us draw inferences from isolated facts after excluding such evidence.

We also held, on the former appeal, that if there had been a conversion or an appropriation of the property, that would have entitled the respondent to a credit upon the debt, to the extent of the value of the property so converted; yet on this trial the court below excluded all testimony of such value either at the time the mortgage was given or at any subsequent time. This we think was clearly error, for the plaintiff is only chargeable with the value of the property at the time of the appropriation, unless indeed he took it in full satisfaction of his debt, of which there is no proof in the return in this case.

The judgment should therefore be reversed and a new trial ordered, with costs of this appeal to the appellant to abide the event.

ALLEN, J., concurred.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

Schnauffer v. Catterbury.

PAULINE H. SCHNAUFFER, Respondent, *against* LOUIS CAT-
TERBURY *et al.*, Appellants.

(Decided July 18th, 1890.)

Where, on the commencement of an action in a district court, an attachment is issued against defendant's property, error in issuing the attachment, or in refusing to set it aside on motion, is not ground for reversal of a judgment for plaintiff for the amount sued for with interest and costs, not including the marshal's fees on the attachment.

APPEAL from a judgment of the District Court in the City of New York for the Tenth Judicial District.

The facts are stated in the opinion.

Arthur C. Butts, for appellants.

BOOKSTAVEN, J.—The action was commenced by summons dated the 28th day of December, 1889, and returnable January 6th, 1890; there is proof that this was personally served. On an affidavit, undertaking, etc., the justice of the district court, on the 28th of December, issued a warrant of attachment against the property of the defendants, which was executed on the same day by one of the marshals of the City of New York. On the return day of the summons the defendants appeared, and on the return of the marshal to the attachment proceedings, moved to set them aside on the ground that the affidavit was insufficient to warrant the issuing of the attachment or to give the court jurisdiction, and also on the ground that the return was false as to the value of the property seized. This motion was denied by the justice, the cause was tried, and at the close of the testimony defendants moved to dismiss the complaint on the evidence, and also on the grounds stated in moving to dismiss the attachment. This was also denied, and a judgment rendered for the plaintiff. From that judgment this appeal was taken, and the appellants contend that on such appeal they have the right to review the attachment proceedings, and that the judgment should be reversed if the justice committed any error in regard to them.

Schnauffer v. Catterbury.

This precise question came up in *Rosenthal v. Grouse* (7 Civ. Pro. Rep. 135), and after mature deliberation was decided adversely to appellants' contention, this court holding that the warrant of attachment was a provisional remedy merely, not involving the merits of the action, or the validity of the process by which the defendant was brought into court, and that it could not be said that the judgment was erroneous though the justice may have erred in upholding the attachment. In the course of that decision *Lang v. Marks* (3 Civ. Pro. Rep. 287), was disapproved of, and it was distinctly shown that, since the adoption of the Code of Civil Procedure, the jurisdiction of the district courts no longer depends on the validity of attachment proceedings, replevin proceedings, etc., but upon the regularity of the summons, its service, etc.

The same conclusion has been arrived at by the General Term of the Supreme Court, Third Department, in *McNeary v. Chase* (30 Hun 491), and by the County Court of Erie County in *Irr v. Schroeder* (6 Civ. Pro. Rep. 253). It is true a contrary opinion was announced by the Superior Court of Buffalo in *Fritze v. Pultz* (2 Civ. Pro. Rep. 142), but that case was reversed on other grounds, as well as on account of the irregularity in the issuing of the attachment, and the court there assumed that, because the justice was in error in that respect, there must be a remedy by appeal; while this court held in *Rosenthal v. Grouse* (*supra*), that in such a case there was no such remedy, but a *casus omissus*, just as there had been in section 3191 of the Code until amended, and we feel bound by that decision.

Had the marshal's fees on the attachment been taxed and included in the judgment, this case might possibly have been distinguished from *Rosenthal v. Grouse*, but as the judgment rendered, as far as appears from the return, was for the amount of the debt with interest and ordinary costs only, not including marshal's fees, and was in all other respects justified by the evidence, we think it should be affirmed, with costs.

ALLEN, J., concurred.

Judgment affirmed, with costs.

Werfelman v. Manhattan Ry. Co.

**DIEDRICH WERFELMAN *et al.*, Respondents, *against* THE
MANHATTAN RAILWAY COMPANY *et al.*, Appellants.**

(Decided July 18th, 1890.)

One who acquires title to land abutting on a public street, after an elevated railroad is built and in full operation on such street, may maintain an action to restrain the maintenance and operation of the railroad and for damages for injuries therefrom to easements in the street, appurtenant to the land. It is not necessary, in such action, that plaintiff should connect himself, by a continuous chain of deeds, with the persons seized of the premises at the time of the building of the railroad. Evidence that he is in possession of the land under a recorded deed, claiming the fee, establishes a presumptive title to the easements in the street as well as to the land, especially where defendants are proceeding to acquire title to such easements by condemnation.

A refusal, in such an action, to make a finding of the abstract proposition that any benefits accruing to the property from the elevated railroad are to be set off against any damages sustained, is not error, where evidence of such benefits was admitted and presumably had its due weight in the decision.

A recovery may be allowed, in such a case, for loss of rental value during the term of a lease of the premises, unexpired when plaintiff purchased them, which had been made after the building of the railroad.

APPEAL from a judgment of this court rendered on the decision of the judge on trial by the court without a jury.

The facts are stated in the opinion.

Julien T. Davies and *Brainard Tolles*, for appellants.

Henry G. Atwater, for respondents.

LARREMORE, Ch. J.—When this case was before us on the former argument, certain authorities were not brought to our attention. After carefully considering not only what these adjudications directly hold, but the necessary inferences from some of the positions taken in them, we have concluded that the points for which appellants contend are no longer

Werfelman v. Manhattan Ry. Co.

open questions, so far as the courts of original jurisdiction are concerned.

The point principally urged by the learned counsel for appellants is, that as plaintiffs acquired title after the elevated road was built and in full operation, they took subject to its notorious and continuous invasion of the easements in the streets; that they therefore presumably paid less for the property than they otherwise would have done; and consequently that the plaintiffs have sustained no damage, but that any loss that has occurred was borne by the owner at the time the road was built, in whose hands said property depreciated.

The remarks of Judge BEACH in *Foot v. Manhattan Elevated R. Co.*, are expressive of the natural attitude of a judicial officer and fair-minded man towards actions of this character. "The case is here presented of a man who goes and buys a piece of property after the elevated road was built, and pays a less price for it because the elevated road is there, and then turns around and sues the elevated road, and in my opinion, he does not occupy a position very commendable in equity."

It does not appear, however, that the learned judge, under the law as it stands, felt authorized to refuse jurisdiction.

On the former argument the case of *Pappenheim v. Metropolitan Elevated R. Co.* (7 N. Y. Supp. 679, 28 N. Y. St. Rep.), was brought to our attention, in which there are some remarks indicating that the General Term of the New York Superior Court believed that a serious question was presented of a plaintiff's right to recover, under circumstances very similar to those here involved. But certainly it cannot be presumed that the Superior Court intended by these *obiter dicta* (the decision was expressly placed on another ground) to overrule their former decision directly on the point, in *Glover v. Manhattan R. Co.* (51 Super. Ct. Rep. 1). In the Glover case it was squarely decided that, whether or not the fee of the street was held by the abutting owners, the latter were entitled to an easement of light, air, and access which constituted property, and ran with the land, passing, by im-

Werfelman v. Manhattan Ry. Co.

plication and without express words, to any subsequent grantee of realty fronting the street, in like manner as any appurtenant easement. It was further said that the building of the road did not give the right of action, but the continued appropriation of plaintiff's rights in the street. "It can make no difference at what time he [plaintiff] became owner of the property, but he is entitled to be protected against unjust appropriation, whether it was acquired by him before the defendants appropriated it, or the day before the commencement of the action." (Page 13).

The decision in the Glover case embodied a deliberate interpretation and application of principles thought to be laid down by the Court of Appeals in the Story case; it was made after elaborate argument by distinguished counsel, and, though involving a most important point, was not appealed from.

As an extreme though not illogical application of the doctrine of the Glover case, our attention has recently also been called to *Mitchell v. Metropolitan Elevated R. Co.* (9 N. Y. Supp. 829), where it was held, by the General Term of the Supreme Court of this department, that a person purchasing property after the erection of the road might maintain an action for an injunction, notwithstanding the fact that the executors of a former owner had obtained and been paid a judgment for the entire permanent damage, it appearing that the said executors never had, as was erroneously supposed, the legal title to such property.

In a former case in this court (*Sanders v. New York Elevated R. Co.*, 15 Daly 388), we held that, in the event of the death of a plaintiff in one of these equity actions, it might be revived in the joint names of his executor and his devisee or heir, the executor representing the cause of action for past damages, the heir or devisee the claim for permanent damage to the fee. If the present contention of appellants is correct, that the whole right of action arising from the operation of the road is a claim for damages accruing to the original owner for the depreciation in the value of his land, there would never be anything to pass to an heir or devisee. Such entire

Werfelman v. Manhattan Ry. Co.

claim for damages would pass to the executor or administrator.

There are other decisions bearing either directly or by implication on the point, but enough has been said to show that the question cannot be treated at this stage as a new one. The lower courts have now been engaged for several years in applying and interpreting the principles which they conceive to be laid down by the Court of Appeals in the Story case and the Lahr case. There has been a substantial concurrence in essential points. Many cases have been decided in all the courts of this county which necessarily assume, even where they do not expressly hold, that the easement of light, air, and access is one running with the land, and passing as an incident of the fee to successive grantees of the realty; and if this principle is now to be overturned, it must be done only by the court of last resort.

Several other points are raised by appellants, all of which, however, we consider already substantially settled. It is insisted that the plaintiffs do not connect themselves, by a continuous chain of deeds, with the persons seized of the premises at the time of the building of the road. But under the doctrine of the Glover case, we do not regard this omission as serious. Plaintiffs are in possession of the abutting land under a recorded deed, claiming a fee. This establishes presumptively their legal title to such fee. The right to the easements in the street follows and is appurtenant to such fee. The same proof which establishes plaintiffs' presumptive title to the land itself, establishes also a right to the easements. Moreover it appears, by a supplemental pleading put in by defendants, that they have commenced proceedings to acquire title to the easements in the streets by condemnation proceedings. This we think is an admission of record that plaintiffs do own such easements, which in itself would dispense with formal proof on the subject (*Watson v. Metropolitan R. Co.*, 8 N. Y. Supp. 533, 29 N. Y. St. Rep. 513).

It was not error for the trial judge to refuse to make a finding of the abstract proposition, that any benefits accruing to the property from the elevated road are to be set off against

Werfelman v. Manhattan Ry. Co.

any damages which may have been sustained. Much evidence was admitted tending to show that such benefit had arisen, and presumably the court gave it due weight in the decision of the case. This was in accordance with the rule laid down in *Newman v. Metropolitan Elevated R. Co.* (30 N. Y. St. Rep. 36), and *Doyle v. Metropolitan Elevated R. Co.* (8 N. Y. Supp. 323, 29 N. Y. St. Rep. 139). But there is nothing in the opinions in those cases, or in the general rules of procedure, which requires a judge to find, in the form of abstract propositions, the successive steps of reasoning by which he reaches the result.

The question of the admissibility of the opinions of experts, as to what would be the value of the property if the road had not been built, has been determined in favor of the respondents, by *Thompson v. Manhattan R. Co.* (8 N. Y. Supp. 641, 29 N. Y. St. Rep. 720), and *Mitchell v. Manhattan R. Co.* (9 N. Y. Supp. 130).

It was not error to allow a recovery for the loss of rental value, during the term of the unexpired lease of the premises when plaintiffs purchased. This lease had been made after the building of the road, and presumably the rent stipulated for it was lower than it would have been if the road had not been there. This point has also in effect been passed upon favorably to respondents. See *Mortimer v. New York El. R. Co.* (29 N. Y. St. Rep. 262).

The judgment should be affirmed, with costs.

BOOKSTAVEN, J., concurred.

Judgment affirmed, with costs.

Hume v. George C. Flint Co.

CHARLES HUME, Respondent, *against* GEORGE C. FLINT
COMPANY, Appellant.

(Decided November 3d, 1890.)

Defendant agreed with plaintiff, that if the latter would use his influence to secure for defendant a contract with one D. to do certain work, defendant would pay plaintiff for such services ten per cent. of the price fixed by the contract for the work. *Held*, that, it appearing that plaintiff rendered such services, he was entitled to the agreed compensation therefor, on the making of the contract between defendant and D.; it was not material whether such contract was secured through the influence of plaintiff.

APPEAL from a judgment of this court entered on the verdict of a jury and from an order denying a motion for a new trial.

The facts are stated in the opinion.

Abram Kling, for appellant.

John H. V. Arnold, for respondent.

BISCHOFF, J.—The learned counsel for appellant appears to be laboring under a misapprehension concerning the nature of plaintiff's claim in this action. It appears from the complaint, as well as from the evidence for the plaintiff taken upon the trial, that the agreement entered into between him and the defendant was that if the plaintiff would use his influence and endeavor to secure for the defendant a contract with one Devin to supply certain cabinet work for the latter's houses, the defendant would pay to him, the plaintiff, for such services a sum equal to ten per centum of the price fixed in any contract which it might make with said Devin. This was not an undertaking on plaintiff's part to procure for the defendant a contract from Devin, as defendant claims; but only that the plaintiff would render services in and about

Hume v. George C. Flint Co.

persuading Devin to make it, and plaintiff's right to compensation was not in any sense dependent upon the successful result of his efforts.

The payment for his services and the amount thereof were to depend upon the making of a contract between Devin and the defendant, but it was immaterial whether or not the contract was procured, through the efforts of the plaintiff, the defendant, or any third person.

It may have been unwise for the defendant to enter into such an arrangement with the plaintiff, but that fact alone is not sufficient to warrant the court in relieving it from the consequences of the improvident acts of its agents. If such an arrangement was knowingly entered into, there appears to be no good reason for refusing its performance by defendant.

The case here presented is analogous to that of *Lampleigh v. Brathwait* (Smith's Leading Cases vol. I., page 67), in which the plaintiff agreed to endeavor to secure for the defendant a pardon, upon the latter's promise to pay to the former for his services the sum of one hundred pounds. The court in that case held that it was immaterial whether or not the pardon was procured through the plaintiff's efforts, and that proof that the plaintiff did render services in endeavoring to procure the pardon was sufficient to entitle him to a recovery. In the present case it abundantly appears from the plaintiff's testimony, and from that of defendant's witness Devin, and defendant's Exhibit 2, which is a letter dated June 29th, 1888, from the witness Devin to the plaintiff, wherein plaintiff's services are acknowledged, that plaintiff did render services in and about his endeavors to secure the contract from Devin.

The exclusion of the following questions by defendant's counsel to the witness Devin was perfectly proper :

" Q. Were you induced by the statements of Mr. Hume to make the contract with the Flint Co. which you did ? "

" Q. Did you tell them, the defendants, when you went there that it was by reason of the acts of Mr. Hume that you came there to make that contract ? "

Hume v. George C. Flint Co.

“Q. Did you ever mention Hume’s name to Flint & Co. when you went there to sign the contract, or tell them that you were introduced by Hume?”

And this is so, for the reason that under the contract claimed to have been entered into by the plaintiff with the defendant it was wholly immaterial whether or not Devin was induced by Hume to make the contract, or whether or not Devin at the time of entering into the contract disclosed to the defendant that he proposed to make it by reason of plaintiff’s endeavors, or that he was introduced to the defendant by the plaintiff. If the plaintiff’s version of his agreement with the defendant is true, he was to be paid compensation only for his services in endeavoring to procure a contract, irrespective of the successful issue of such endeavors.

There is no force in the appellant’s exception to the alleged refusal of the trial justice to charge the jury, “That if they find that, on the seventh day of June when the alleged contract with the plaintiff is alleged to have taken place with the defendant, that at that time Mr. Hume was negotiating with Mr. Devin to do the work himself, in that event the jury must find a verdict for the defendants.”

The judge did charge the jury substantially as requested by defendant’s counsel. He said, “The plaintiff cannot have commission from both sides. It is claimed by the defendants that he was endeavoring to do that. If that was true while he was working for the defendant he cannot recover in this action at all, provided you believe he was undertaking to get commissions from Mr. Devin as well.”

It appears that all the material facts in dispute were properly left to the jury, that there was sufficient evidence to sustain a verdict for the plaintiff, and I can discover no errors on the part of the trial court prejudicial to the defendant.

The judgment appealed from should be affirmed, with costs.

J. F. DALY, J., concurred.

Judgment affirmed, with costs.

Steffens v. Steffens.

CHRISTOPHER STEFFENS, Appellant, *against* LOTTIE L. STEFFENS, Respondent.

(Decided November 3d, 1890.)

Under the amendment of 1887 to section 831 of the Code of Civil Procedure, making a party to an action for divorce, charged with the commission of adultery, competent as a witness on his own behalf to disprove the charge, such a party is not limited to a bare denial, but may testify to any facts or circumstances tending to disprove the facts and circumstances advanced to support the charge, or to avoid the inferences to be drawn therefrom.

Since that amendment, the force of the reason requiring corroboration of the alleged paramour's testimony has been considerably weakened, and the sufficiency of such testimony must now depend mainly upon the degree of credibility a judge or jury sees fit to attach to it.

In an action against a wife for divorce on the ground of her adultery, the alleged paramour testified to sexual intercourse with her in open fields in the night time. This was denied by her. There was no testimony that they were seen, at or about the times stated by him, in or near the fields mentioned, nor was there proof of any amorous conduct between them, or of a criminal attachment on her part for him, as her conduct with him, shown by the evidence, although it might appear suspicious and improper; was capable of an innocent interpretation; evidence, also, offered by way of corroboration, as showing undue familiarities by her with others, tended only to show indiscreet acts by her, not amounting to proof of criminality, or rested solely on surmises of her servants, or on their testimony to admissions by her to them of attachment for another, which she denied; and the testimony of the paramour was in itself full of improbabilities, and the referee, in finding for defendant, placed his disbelief thereof not only on its inherent improbability, but on the manner and conduct of the witness while under examination. *Held*, that such finding should be sustained.

APPEAL from a judgment of this court entered on the report of a referee.

The facts are stated in the opinion.

A. H. Dailey, for appellant.

Horace Graves, for respondent.

BISCHOFF, J.—This action was brought by plaintiff for a divorce from the defendant on the ground of her alleged adultery. The defendant in her answer denies the commis-

Steffens v. Steffens.

sion of adultery, and makes counter-charges of marital infidelity against her husband, and asks for a dissolution of the marriage on that account. The issues were referred to J. H. V. Arnold, Esq., as referee, before whom the parties duly appeared, and each contested the accusations of the other. The referee reported to the effect that neither of the parties had been proven guilty of the offenses charged, which report was duly confirmed and judgment denying a divorce to either party was thereupon entered. From this judgment plaintiff has appealed to this court.

Careful scrutiny and consideration of the case on appeal fail to disclose any error in the conclusions of the referee, either upon questions of fact or of law.

The exception of the plaintiff to the admission of the defendant's testimony in denial of the attempted proof of her adultery is not well taken. By section 831 of the Code of Civil Procedure, as amended in 1887, a party to an action for divorce charged with the commission of adultery is competent as a witness on his own behalf to disprove the charge. This does not mean that the party is limited to a bare denial of the charge. He may testify to any facts or circumstances tending to disprove the facts and circumstances advanced to support the charge or to avoid the inferences to be drawn therefrom (*Irsch v. Irsch*, 12 Civ. Pro. Rep. 181).

A more serious question, however, arises on the sufficiency of the evidence relied upon by the plaintiff as corroborative of the testimony of Hiram Bull, the alleged paramour of the defendant.

The evidence submitted on this appeal fails to disclose any successful attempt by the plaintiff to substantiate the charge of adultery against the defendant, either circumstantially or directly, other than by the testimony of the alleged paramour. And a paramour, being *particeps criminis*, has always been classed with other accomplices whose testimony is relied upon to prove the guilt of the accused, and whose testimony has always been held to be subject to the same objections. One of these objections is that the testimony of an accomplice should not be deemed sufficient to warrant conviction, unless

Steffens v. Steffens.

such testimony is corroborated in some material part by one or more credible witnesses. This requirement of corroboration, however, seems rather to be a precaution on the part of the court, than a rule of law. Such precaution, so far as it is applied to the testimony of paramours, is mainly founded upon the inability of the party charged with adultery to contradict the testimony of the alleged paramour, because of the legal incompetency of husband or wife to testify as witnesses in actions for divorce brought by either against the other (2 Bishop on Marriage & Divorce, § 642, notes 1, 2, 4; Stewart on Marriage & Divorce, §§ 247 and 252, and cases there cited; *Platt v. Platt*, 5 Daly 295; *Anon.*, 17 Abb. Pr. 448; *Anon.*, 5 Robt. 611; Taylor on Evidence, ¶ 967; 1 Greenleaf on Evidence, §§ 380, 381.)

Since the amendment of section 831 of the Code of Civil Procedure permitting either the husband or the wife to become a witness in an action brought by the other to procure a divorce on the ground of adultery for the purpose of disproving the charge of adultery, the force of the reason requiring corroboration of the alleged paramour's testimony has been considerably weakened. And the sufficiency of the alleged paramour's testimony must now depend mainly upon the degree of credibility a judge or jury sees fit to attach to it. And since such amendment, the refusal of the person charged with adultery to deny as a witness on his or her own behalf the truth of the alleged paramour's testimony, may of itself be considered corroboration of that testimony. So, also, proof of the lewd, lascivious and lustful disposition or inclinations of the person charged with adultery may be sufficient corroboration of the alleged paramour.

The consideration of the question of corroboration, however, does not appear to be applicable to the present case. I fail to discover in the evidence submitted any proof of lewd or lascivious inclinations on the part of the defendant, outside of the testimony of Hiram Bull, to which I shall again refer.

The occurrences participated in by the defendant in the villages of Hillsdale and of Monroe, where she and Hiram

Steffens v. Steffens.

Bull, in the presence and for the amusement of others, masqueraded and frolicked; the defendant's attempt to inflict playful blows upon William Bull on the occasion of the celebration of the anniversary of his twenty-first birthday, and the social games at the house of Harrison Bull, appear to have been nothing more than puerile sports and pastimes. And it would require a certain degree of moral debasement to seriously construe participation in these occurrences to be proof of lewd or lascivious conduct on her part, to which I would be reluctant to confess. It may have been unwise, looked upon from the standpoint of purely conventional propriety, for the defendant to have taken part therein, but in the consideration of defendant's guilt it manifestly would be unfair to interpret her actions by one's own notions of what may or may not be proper conduct on the part of a married woman, so long as such conduct does not border on immorality.

The circumstances relied upon to establish the lustful disposition of the defendant in *Pfeiffer v. Pfeiffer* (9 N. Y. Supp. 28, 27 N. Y. St. Rep'r 56) were much stronger than those relied upon in the present case; yet the court held in that case that, though the acts of the defendant might appear suspicious and improper, if they were capable of an innocent interpretation, they must be so construed; a proposition which the presumption of innocence in the absence of proof of guilt makes imperatively applicable.

Hiram Bull, the alleged paramour, testified to undue intercourse with the defendant in open fields in the night time in or near the village of Monroe; but it was not even attempted on the part of the plaintiff to show by the testimony of any other witness that the defendant and Hiram Bull, at or about the times stated by him, were seen in or near the fields mentioned. And this case is also wholly barren of proof tending to establish amorous conduct between Hiram Bull and the defendant, or a criminal attachment on the part of the latter for the former. Nor have I failed to observe that, for the purpose of establishing such conduct and attachment, the plaintiff lays great stress upon one occasion when the

Steffens v. Steffens.

defendant and Hiram Bull in the presence of their respective mothers and others were reclining on the lawn immediately in front of their then residence, with her head resting upon or against his person ; but it would require something more than a mere stretch of the imagination to distort this single occurrence into proof of a criminal attachment on the part of the defendant toward Hiram Bull. The conduct of the parties was not clandestine or accompanied by anything tending to establish consciousness of wrong-doing on the part of the defendant. Hiram Bull at this time appears to have been a lad hardly seventeen years of age, while the defendant was scarcely twenty-one, and, however reprehensible her conduct may have been because of this familiarity, owing to its likelihood to subject her to censure and adverse criticism, it is not improbable that in the exuberance of youthful spirits the defendant was more thoughtless than she would have been if she had arrived at maturer years. Under the circumstances it would be monstrous in the extreme to hold that this isolated occurrence branded the defendant with the mark of degradation, and established her inclination to surrender her matronly virtue to Hiram Bull. Conceding, however, for the moment, that the contention of the learned counsel for the plaintiff appellant is correct, and that evidence of undue familiarities toward persons of the opposite sex other than Hiram Bull is admissible in corroboration of his testimony, I do not hesitate to say that the evidence adduced for the plaintiff falls short of establishing such undue familiarity.

Such evidence, so far as it relates to Byrnes and is explained by his uncontradicted testimony and the testimony of the defendant, amounted to nothing more than the acceptance of mere conventional gallantry extended to the defendant by him. And the incident of the letter from the defendant to the plaintiff, falsely representing that she had not visited New York on the occasion of her trip there accompanied on the railroad train by Byrnes from Hillsdale to the Grand Central Depot, convicts her of falsehood, but of nothing more. It is true that it may seem unaccountable that she should have been guilty of this falsehood, but is it a just or reasonable

Steffens v. Steffens.

inference, because the defendant had sought to hide from the plaintiff her visit to the city, that she must have been criminally intimate with Byrnes, without the slightest proof of any opportunity therefor?

The other acts of undue familiarity with persons other than her husband consisted of suffering herself to be kissed by a Mr. Forbes, a Mr. Sayre, and a Mr. Harrison Bull, on the occasion of social festivities at the latter's house, and while participating in harmless games common to the people of Monroe. In participating in these games without the presence or the previous sanction of her husband, the defendant may have been indiscreet, but I am utterly unable to share the view that such indiscretion tends to convict the defendant of marital infidelity.

Other incidents urged by the plaintiff as corroborative of Hiram Bull's testimony were that on one occasion she kissed one Everitt McDonald, who was residing at her husband's house, and that on another occasion, and while McDonald was confined to his bed by illness, but without any attempt at secrecy, she entered his bedroom, remaining there but a very short time, her servant Margaret Flynn being in an adjoining room all the time, and knowing of her presence in the bedroom. In the light, however, of the uncontradicted testimony for the defense that McDonald was a near relative of the defendant, I would hesitate to convict her of adultery even though she may not have denied these incidents.

The attempted proof of misconduct with Gibbs seems to rest exclusively on the surmises of the defendant's servants Margaret Flynn and Margaret Neville, seemingly without justification. It appears that Gibbs resided with his mother on Fifty-seventh Street near Ninth Avenue, in the neighborhood of plaintiff's residence; that his place of business was in the lower part of New York; that he was in the habit of taking the cars for down town at or near the corner of Fifty-seventh Street and Ninth Avenue, at which place the defendant's servants, from the rear windows of plaintiff's apartments on Fifty-eighth Street corner of Ninth Avenue, had frequently seen him standing; that on several occasions these

Steffens v. Steffens.

servants had observed a meeting between Gibbs and the defendant; that defendant had vouchsafed no explanation to her servants of these meetings, and that, with no proof that they had been pre-arranged, and only because of the defendant's reticence in speaking of them to her servants, they, the servants, concluded an intrigue existed between the defendant and Gibbs.

The evidence as to alleged undue familiarity with and as to correspondence between the defendant and Faircloth exists only in the testimony of the defendant's servants, to the effect that the defendant had admitted to them that she had entertained an affection for Faircloth and had maintained a correspondence with him, and that, on the occasion of her visits to her aunt, Mrs. Phelps, in Jersey City, she had met Mr. Faircloth at her aunt's where Mr. Faircloth and his wife were lodgers. I fail to see anything suspicious in these meetings between the defendant and Faircloth, and in view of his most positive denial of ever having received any letters from the defendant, and the defendant's equally positive denial of ever having corresponded with him, and also her denial of her ever having admitted to them an affection for him, I am not inclined to place any reliance upon the testimony of the servants as to these admissions. Such testimony does not directly establish the facts alleged to have been admitted. The accuracy of the repetition of admissions is dependent entirely upon the witness' intelligence, the reliability of his recollection, the correctness of his understanding, the difficulty of imparting the inflections or deflections of voice, and the gestures accompanying the alleged admissions, the reproduction of all of which is essential to correctly convey the meaning of language employed in making the alleged admissions. Such testimony has always been regarded as evidence of the lowest order, to be accepted only with jealous caution. (1 Greenleaf on Evid. § 20).

The testimony of Hiram Bull, the alleged paramour, bristles with improbabilities, and should be rejected even though corroboration should not be requisite. It is difficult to understand how a lady of culture and refinement, such as the evidence

Steffens v. Steffens.

shows the defendant to have been, with her chastity up to the time referred to unimpeached, could have submitted herself to the criminal embraces of a paramour, without previous amorous regard and affection having been established between them. According to Hiram Bull's story, we are asked to accept as true that he and the defendant, on the occasions detailed in his testimony, without previous understanding, without the exchange of a single word expressing the intention of either party to meet the other with intent to gratify his or her lustful desires, or the occurrence of anything justifying in the slightest degree any suspicions on the part of Hiram Bull that the defendant would yield herself to him, impulsively proceeded toward the place where the acts of adultery are alleged to have been committed, and, arriving there and still under the same impulses, and without communication by one to the other of his or her desire, they had sexual intercourse. Hiram Bull while on the witness stand was utterly unable to account for the defendant's submission to him, other than the reason (as he stated) that the defendant yielded to him because she was overcome by his personal beauty.

I desire in this connection also to call attention to the fact that the evidence shows that, after the institution of this action and subsequent to the time when, as is alleged, the plaintiff had acquired knowledge of the betrayal of his wife by Hiram Bull, and that the felicity of his home was terminated by her betrayal by him, he seems to have harbored the alleged paramour as a welcome visitor, and to have hospitably entertained him for several days. It may be that the plaintiff believed that to secure the testimony of the alleged paramour it was prudent to maintain apparently friendly intercourse with him for the time being, but if so, it scarcely justifies the claim of plaintiff's counsel, that, inspired by a higher standard of morality of recent acquisition, and impelled by a spirit of repentance and a desire for atonement, Hiram Bull sought to make all possible reparation to the injured husband, and came forward voluntarily to confess his share in the wrong and assist the plaintiff in ridding himself of an unfaithful wife.

Steffens v. Steffens.

Fully satisfied as I am that the referee correctly ruled upon the legal questions raised upon the trial of this action, I do not hesitate to say that his conclusions upon the facts are fully justified by the evidence. To support his claim for dissolution of the bonds of matrimony with the defendant, a plaintiff must establish the commission of the act of adultery charged by a preponderance of evidence. If the weight of evidence be evenly balanced, or preponderate in favor of a defendant, the plaintiff has failed to show himself entitled to the relief claimed. To arrive at a just conclusion when the evidence is conflicting and the statements of the witnesses contradictory, the observance of the witnesses while under examination as to their manner and demeanor is essential to establish the degree of credibility which should be given to their testimony.

In the present case the referee, in his opinion accompanying the report, places his disbelief of the testimony of Hiram Bull, not only upon the inherent improbability of the truth of his statements, but also upon the manner and conduct of the witness while under examination and his demeanor when giving his testimony. In such cases, in the absence of apparent injustice or gross and flagrant disregard of the evidence, the appellate court should not interfere.

In *Westerlo v. De Witt* (36 N. Y. 344), Judge HUNT says: "The general disposition of the courts is to sustain the referee in his findings of fact. This is not precisely the same question as if we were inquired of whether we should have found the same facts and have determined the law in the same manner. It is, rather, are we so certain that the referee was in error upon the facts that we will assume to reverse his judgment. If the case is doubtful, the conclusion should not be reversed; if, upon reading the evidence, this court should be of the opinion that the conclusion might well have been either way, then the fact that the referee saw the witnesses, heard them testify, and had the nameless opportunities of judging of their character that personal acquaintance can only give should induce us to defer to his judgment." See, also, *Baird v. Mayor* (96

Hannay v. Zerban.

N. Y. 567); *Sherwood v. Hauser* (94 N. Y. 626); *Parrott v. Knickerbocker Ice Co.* (46 N. Y. 361).

The judgment appealed from should be affirmed, with costs.

J. F. DALY, J., concurred.

Judgment affirmed, with costs.

GEORGE B. F. HANNAY, Appellant, *against* ANDREW ZERBAN, Respondent.

(Decided November 7th, 1890.)

A contract for the employment of plaintiff by defendant, as teacher in a school of which defendant was proprietor, stated the terms and conditions of the employment in ten clauses, the sixth of which provided that, "without just cause of complaint on the part of" defendant, the engagement should be for one year, fixing the dates of commencement and termination thereof; and the tenth clause was, "monthly notice required of either party." The other clauses related exclusively to the services required of plaintiff, and the manner of paying his salary, and did not refer to any right of either party to terminate the employment before its expiration by lapse of time. *Held*, that the tenth clause should not be construed as reserving a right to determine the employment by giving a month's previous notice of election to do so, as such construction was not necessary to reconcile that clause with the sixth clause, and would require the interpolation of additional words.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered on the dismissal of the complaint at the trial.

The facts are stated in the opinion.

John M. Scribner, for appellant.

Ernest Hall, for respondent.

BISCHOFF, J.—The defendant was the proprietor of a school in the city of New York, known as the "Lenox In-

Hannay v. Zerban.

stitute" and the "Lenox Annex," and on or about June 18th, 1888, entered into an agreement with the plaintiff for the latter's employment, which agreement was as follows:

" Andrew Zerban,

" P. O. Box 94,

" New York.

" New York, 18th June, 1888.

" Mr. G. B. F. Hannay, City.

" Dear Sir :

" I hereby purpose to stipulate the terms and conditions under which you will act as teacher, at the Lenox Institute.

" 1. It is intended that you shall teach mathematics, history, geography, and the branches of the English language as you may be desired and in accordance with the requirements of the school.

" 2. That you will devote your entire time and energy to teach only pupils of the Lenox Institute, and the Lenox Annex, as may be assigned to you.

" 3. That your attendance at school shall average daily from 8:30 A. M. until noon, and on Monday, Tuesday, Thursday, and Friday from 1 till 5:30 P. M.

" 4. During the time of the summer vacations you will attend one month daily two hours between 8 and 10 A. M. at school to correct the repetition and preparatory lessons of the pupils.

" 5. Whenever you are desired to do so you will represent towards visitors or representatives of pupils the Institute, as well within as without the Institute Building.

" 6. Without any just cause of complaint on the part of the Institute, it is understood that your engagement with the Lenox Institute is by this instrument intended to be for one year, viz: from the 1st day of September A. C. until the same date in 1889.

" 7. The summer vacations terminate with the first of September, after which date until the formal opening of the school, a from three to five hours daily attendance may be required of you at school.

Hannay v. Zerban.

" 8. Your monthly salary of \$90 will be paid to you on the last day of each month.

" 9. You will teach from the lowest elementary class to the highest ones which the Institute may form.

" 10. Monthly notice required of either party.

" Accepted.

" G. B. F. Hannay.

" Andrew Zerban."

Pursuant to this agreement the plaintiff entered upon his employment and continued therein until December 31st, 1888. On or about November 28th, 1888, the defendant, claiming the right to do so under the agreement, undertook to terminate the plaintiff's employment by a notice in writing dispensing with his services after December 31st of that year. And defendant thereafter refused to avail himself of plaintiff's services, although the latter offered them and disputed the former's right to terminate the employment before the expiration of the term agreed upon. Thereupon the plaintiff brought this action to recover damages for breach of contract; the damages alleged being the stipulated salary for the months from January to August, 1889, both inclusive, after deducting the plaintiff's earnings from other sources during that period.

The agreement was put in evidence on the trial, and plaintiff admitted having received the notice hereinbefore mentioned, purporting to terminate his employment. When the plaintiff rested, the defendant's counsel moved to dismiss the complaint, on the ground that, on a proper interpretation of the tenth clause of the contract, the right was reserved to the defendant to terminate the employment upon giving to plaintiff a previous notice of his election to do so; and that, having so elected to terminate the employment, no future salary could accrue to plaintiff, and that, for such reason, no cause of action was proved. The trial justice, concurring in the views of counsel, dismissed the complaint. The plaintiff thereupon appealed to the General Term of the court below,

Hannay v. Zerban.

and upon argument the judgment rendered at trial term was sustained.

Upon a careful examination of the agreement and consideration of the question presented for review, I am convinced that the judgment was erroneous, and that the court below, as well as the learned counsel for the parties to this appeal, overlooked an imperative rule governing the interpretation and construction of contracts by the courts. The rule is, that, in seeking to give effect to the true intent and meaning of the several provisions of a contract as the same were understood by the parties at the time of its execution, the court is limited to the consideration of the language of the agreement. If there is any ambiguity or uncertainty arising from the employment of certain words, terms, or phrases, the court may ascertain the circumstances surrounding the execution of the contract, and depart from the literal meaning of words, if that be necessary, to conform to the true intent of the contracting parties, and for such purpose may transpose words and depart from the laws of grammar and punctuation ; but the court can go no further. Nothing which is not expressly contained within the language of the contract, or which may not be fairly implied therefrom, can be supplied by the court on any proper theory of interpretation, because the interpolation of any stipulation or provision not expressly or impliedly contained within the language of the agreement, would in effect be the making of a new contract for the parties by the court. If it appears that any particular provision was intended by the contracting parties to be incorporated into their contract, and that the same has been omitted, the agreement cannot be extended to this omitted provision by any proper process of interpretation. Such omissions can only be supplied by a court of equity, on a proper application for the reformation of the contract. To supply such an omission, upon any true theory of interpretation, would in effect be to set aside the well known rule that parol testimony cannot be admitted to add to, vary, modify, or contradict the terms of a written contract. The rule is stated in Greenleaf on Evidence (Vol. 1 § 277) as follows :

Hannay v. Zerban.

“It is to be observed that the rule is directed only against the admission of any other evidence of the language employed by the parties in making the contract than that which is furnished by the writing itself. The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the court, in such cases, is to ascertain, not what the parties may have secretly intended, as contra-distinguished from what their words express, but what is the meaning of words they have used. It is merely a duty of interpretation; that is, to find out the true sense of the written words, as the parties used them; and of construction; that is, when the true sense is ascertained, to subject the instrument in its operation to the established rules of law. And where the language of an instrument has a settled legal construction, parol evidence is not admissible to contradict that construction.”

See, also, Parsons on Contracts, 5th ed., vol. 2, p. 564; Chitty on Contracts 11th Am. ed., vol. 1, p. 105; Wharton on Contracts, vol. 2, ¶ 661; 1 Addison on Contracts, Am. Law Series Edition, p. 287; *Hudson Canal Co. v. Pennsylvania Coal Co.* (8 Wall. 276); *Gavinzel v. Crump* (22 Wall. 308); *Robbins v. Clark* (127 U. S. 622); *Brawley v. United States* (96 U. S. 168).

Applying the above rule in the consideration of the contract, it appears that the sixth clause provides for the commencement and duration of plaintiff's term of employment, to wit: from September 1st, 1888 to September 1st, 1889, and to be terminated before the expiration of the period limited only upon just cause of complaint on the part of the defendant. The 1st, 2d, 3d, 4th, 5th, 7th, 8th and 9th clauses of the contract refer exclusively to the services required of the plaintiff and the manner of paying his salary. And it is not and cannot be contended that these last-mentioned clauses can in any manner be construed as conferring upon either party the right to terminate the employment before its expi-

Hannay v. Zerban.

ration by lapse of time. The tenth clause is as follows: "10. Monthly notice required of either party." And in this clause is grounded the contention of the defendant that there was reserved to him a right to terminate the employment upon giving a month's previous notice of his election to do so. It is admitted that the literal and ordinary meaning of the words "monthly notice" is a notice every month or from month to month, and in this occurs the first violence to the language of the contract in defendant's attempt to justify his right to terminate the employment; for in so doing he is forced to admit that the words "monthly notice," a notice from month to month, or every month, imply a continuance of the employment, and therefore negative any claim or right to determine it. And to make the language of the contract consistent with defendant's claim it is necessary to substitute the words "a month's notice" for the words "monthly notice." Further, the clause is entirely silent as to the character or purpose of the notice required. There may be many details in the management of a school which could properly be the subject of a monthly notice, or notice every month, or notice from month to month, by the plaintiff to the defendant, or *vice versa*. But there is nothing contained in any portion of the contract which could serve to inform one concerning the nature or object of the notice required. The defendant contends that the notice comprehended by the clause referred to was a notice of the election of either party to the other of his intention to terminate the employment. But from the fact that the agreement in positive language fixes the term for one year from September 1st, 1888, to September 1st, 1889, and nowhere makes reference to any right by either party to terminate the employment before its expiration by lapse of time, the defendant's contention is wholly arbitrary. It is not and will not be contended that the language of any clause preceding the tenth clause will bear a construction such as the defendant is seeking to maintain. To give effect to his contention one would necessarily be compelled to add to the tenth clause the words "of his intention to terminate the employment," or words of similar import or effect. Without the addition of such words

Hannay v. Zerban.

one is left to conjecture as to the purport of the required notice, and from the language of the contract preceding this tenth clause it is not disclosed that any notice whatsoever was intended to be given by plaintiff to defendant, or by defendant to plaintiff. If it was intended by either party to the contract to incorporate therein a clause conferring upon him the right to determine the employment upon a month's previous notice, the contract is defective in that respect. And to add the words necessary to give effect to the defendant's construction, as attempted by him, would require the incorporation of a provision not contained within the terms of the language of the parties when their contract was reduced to writing. Interpretation cannot be carried to this extent under the legal limit above referred to. It is claimed that the contract should be so construed that effect will be given to every part thereof. This is unquestionably so, provided the legal inhibition upon the powers of the court is not infringed. An attempt to reconcile the sixth and tenth clauses of the contract before us does not necessarily lead to the conclusion that the notice contemplated by the tenth clause was a notice of election to terminate the employment. There may be many matters, as before stated, which could be the subject of a notice by one party to the other, and the clear and explicit language of the sixth clause, fixing the duration of the employment and providing that the same should continue to the end of the term stated, unless the defendant had just cause of complaint, precludes the suggestion that a right to determine the employment before the expiration of the term fixed by lapse of time was intended to be reserved by the tenth clause. To carry the construction contended for by defendant into effect, the interpolation of additional words into the contract cannot be avoided, which would not be within the powers and restrictions of the court above indicated as governing the interpretation and construction of contracts.

The judgment appealed from should be reversed and a new trial ordered, with costs.

J. F. DALY, J., concurred.

Judgment reversed and new trial ordered, with costs.

Matter of Littell.

In the Matter of the Assignment of GEORGE M. D. LITTELL *et al.* to HENRY APLINGTON, for Benefit of Creditors.

(Decided November 7th, 1890.)

Where the necessity for the employment of counsel by an assignee for benefit of creditors arises after he has filed his account, on objection by a creditor to the account, leave may be granted to him to submit to the court at special term proof by affidavit of the reasonableness of the counsel fee charged, to which affidavit objecting creditors should be permitted to reply.

APPEAL from so much of an order of this court as disallowed, on an accounting by an assignee for benefit of creditors, part of a counsel fee alleged to have been paid by him.

The facts are stated in the opinion.

Nelson Smith, for appellant.

James M. Hunt, for respondent.

BISCHOFF, J.—The assignee having filed his account, Cortland B. Littell, a creditor, objected thereto and insisted that the assignee should be charged with the sum of \$2,583.70, the amount of certain penalties alleged to have accrued to the assignor from the Importers and Traders National Bank under sections 5197 and 5198 of the Revised Statutes of the United States. It having been alleged that such bank had exacted the payment of usurious interest from the assignors, a reference was ordered, and the referee having duly made his report disallowing the creditor Littell's claim that the assignee's account should be charged with said \$2,583.70, an application was made at special term for the confirmation thereof, and said report was duly confirmed. Upon the hearing of the application to confirm the report, the assignee asked to be allowed, out of the balance remaining in his hands at the time of the filing of his account, the amount of his commissions, the amount of the referee's and the stenographer's fees upon the accounting, and the sum of five hundred dollars alleged to have been paid by him for the

Matter of Littell.

reasonable and necessary fees of his counsel for services rendered since the filing of the account. To the allowance of the item for counsel fees, creditor Littell objected on the ground that the same was excessive, and the court disallowed two hundred and fifty dollars thereof, against the protest of the assignee, and, as appellant contends, without regard to his request to be permitted in such manner as the court might direct to establish by proof the necessity for the employment of counsel and the reasonableness of the sum alleged to have been paid for counsel fees. Thereupon the assignee appealed from so much of the order confirming said referee's report as disallows the sum of two hundred and fifty dollars, part of the counsel fee alleged to have been paid as aforesaid.

The right of an assignee to employ counsel in matters growing out of the administration of the trust estate committed to his care, and to pay counsel fees out of such estate whenever the employment of counsel is reasonably necessary, is unquestioned (*Matter of Wolf v. Kahn*, 1 N. Y. St. Rep. 273; *Matter of Levy*, 1 Abb. New Cas. 182).

The facts clearly justified the employment of counsel by the assignee, and I do not understand the objection on the part of creditor Littell to the allowance of the sum alleged to have been paid by the assignee for counsel fees to extend further than to the reasonableness of the sum paid. I think, however, that the learned justice at special term erred in his refusal to permit the assignee to show such reasonableness by proof of the value of the services rendered.

While the court, from the proceedings before it and the intricacy of the questions raised upon the accounting, could have determined the necessity for the employment of counsel, it could not have taken judicial notice of the value of services of counsel, and could not have determined the value of the same in the absence of proof, without assuming the dual character of court and witness. In the *Matter of Hulbert* (10 Abb. New Cas. 284, affirmed 89 N. Y. 259), the direction of the court that the value of services of counsel should be ascertained by a reference for that purpose upon the application by the assignee for the allowance of counsel fees was

Matter of Littell.

sustained, and the court says that "when it comes to the charge of a counsel fee upon an accounting, then the referee should have some evidence which he can submit to the court going to show that the charge in respect to the accounting is a reasonable and proper one. We think, therefore, that in that respect there should have been a reference back to the referee to take proof in regard to the value of the counsel's services upon such accounting, and that the counsel should have been allowed in this proceeding the value of such services, without taking into consideration, in view of the facts of this case, any amount which he had received during the course of the administration."

In the present case the necessity for the employment of counsel did not arise until after the assignee had filed his account, and the value of the services of counsel rendered necessary by the creditor's objection to the account could not well have been a matter for the consideration of the referee upon the accounting, since the extent of such services was not ascertainable at that time.

The court might with propriety have refused to direct a reference to ascertain the reasonableness of the counsel fee alleged to have been paid by the assignee, and thus avoided the subjection of the trust estate to additional burdens, and this was probably all that was intended by the judge at special term, although the language of the order appealed from will bear a different construction. Leave should have been granted to the appellant to submit proof by affidavit of the reasonableness of the counsel fee sought to be charged.

That part of the order confirming the referee's report, which disallows a part of the counsel fee alleged to have been paid by the assignee, should be reversed, with costs, and with leave to appellant to submit to this court at special term proof by affidavit of the reasonableness of the sum alleged to have been paid, to which affidavit the respondent should be permitted to reply.

J. F. DALY, J., concurred.

Order accordingly.

Arnstein v. Haulenbeek.

EMANUEL ARNSTEIN, Appellant, *against* ELLEN A. HAULEN-BEEK, Respondent.

(Decided December 1st, 1890.)

An order of the General Term of the City Court of New York affirming an order denying a new trial cannot be reversed on appeal to this court on the ground that it is against the weight of evidence.

Error, if any, in excluding a question to a witness as to an indorsement of a pass-book, is cured by the subsequent admission of the book itself.

Where defect of parties is not pleaded, the exclusion of evidence that a person not a party to the action was a partner of plaintiff is not error.

The exclusion of evidence, corrected, if erroneous, by subsequent proof of the fact, is not ground for reversal.

A judgment cannot be reversed on the ground that a statement of the evidence in the charge of the court below was incorrect, where no request for a correction was made by appellant.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered on the verdict of a jury and an order denying a motion for a new trial.

The facts are stated in the opinion.

H. B. Vandyke, for appellant.

A. L. Jacobs, for respondent.

PRYOR, J.—The appeal is from a judgment of the General Term of the City Court affirming a judgment on a verdict, and from an order affirming an order denying a motion on the minutes for a new trial. The action is upon an account stated, for goods sold and delivered. The answer is a general denial. That the goods were sold and delivered, and that the balance claimed has not been paid, were conceded facts on the trial. The only issues litigated were the statement of account and the liability of defendant.

Upon the appeal from the order, defendant's contention is that the verdict is against the weight of evidence. But, the

Arnstein v. Haulenbeek.

rule is settled beyond controversy that, upon appeal from an order of the General Term of the City Court affirming an order denying a new trial, this court cannot reverse the order on the ground that the verdict is against the weight of evidence (*Rowe v. Comley*, 11 Daly 317; *Farley v. Lyddy*, 8 Daly 515; *Tinsdale v. Murray*, 9 Daly 446; *McEnteere v. Little*, 8 Daly 167; *Bell v. Bartholomew*, 11 Rep'r 510, 12 Weekly Dig. 33; *Duryea v. Vosburg*, 121 N. Y. 57). But even had this court jurisdiction to review the order, it must be affirmed: because the case does not purport to contain all the evidence bearing on the questions in controversy (*Aldridge v. Aldridge*, 120 N. Y. 614; *Porter v. Smith*, 107 N. Y. 531; *Davis Sewing Machine Co. v. Best*, 50 Hun 76; *Wellington v. Improvement Co.*, 62 Hun 409; *Murphy v. Board*, 53 Hun 171; *Cheney v. Railroad Co.*, 16 Hun 415; *Cornish v. Graff*, 36 Hun 160). It is sufficient for the respondent that the case exhibits some evidence to support the verdict (*Aldridge v. Aldridge*, *supra*).

In the interest of substantial justice it should be said, that, on a careful examination of the evidence, we do not observe such a preponderance of proof for the appellant as would warrant a reversal of the verdict (*Baird v. Mayor*, 96 N. Y. 567). Upon the issues litigated, the case shows a direct conflict of evidence between the two witnesses of the respondent and the two witnesses of the appellant; and the rule is fundamental and familiar, that the credibility of testimony is exclusively for the jury.

The exceptions to the rulings and charge of the court are obviously untenable.

(1) The exclusion of the question, "Look at this pass-book and say whether that was not ordered in the name of P. Haulenbeek?" if erroneous, was corrected by the subsequent admission of the book itself, which exhibited the indorsement to the jury.

(2) As the answer alleged no defect of parties, the testimony stricken out and the testimony excluded, as to Berg being a partner of plaintiff, were irrelevant to any issue in the action. A defect of parties plaintiff is waived if not

Arnstein v. Haulenbeek.

taken either by demurrer or answer (Code Civ. Pro. § 499; *Zabriskie v. Smith*, 13 N. Y. 322; *Palmer v. Davis*, 28 N. Y. 242).

(3) In the absence of a plea of payment, there was no error in excluding evidence that Mrs. Haulenbeek had settled the account sued for (*McKyring v. Bull*, 16 N. Y. 297), and the fact that Mr. Haulenbeek paid some bills by his check as agent, authorized no inference that he was discharging his own obligation, but the reverse rather. But the error, if any, was corrected by subsequent proof of the fact.

(4) Appellant's final exception is to the charge of the court that "unless you believe the plaintiff on that point, he must fail, unless you believe the evidence of the plaintiff and his bookkeeper to the effect that Mrs. Haulenbeek promised to pay this bill on several occasions." The ground of objection was, as stated by counsel, my "remembrance that they testified that she would see Mr. Haulenbeek, and have him see to it." But counsel's memory was at fault. Plaintiff testified that defendant said "she would see that I got my money," and the bookkeeper testified that when he presented the bill to defendant, she said "she didn't have the money then, but would have it by the next day," and that "she had got the bill and would pay it," (fol. 32). The court, therefore, did not misstate the evidence in saying that, in effect, plaintiff and his bookkeeper testified that defendant promised to pay the bill. If it were otherwise, however, appellant should have requested the court to correct its charge, so as to conform it to the testimony.

The judgment and order must be affirmed, with costs.

J. F. DALY, Ch. J., and BISCHOFF, J., concurred.

Judgment and order affirmed, with costs.

Baumann v. Post.

SAMUEL BAUMANN, Respondent, *against* EDWARD S. Post,
Appellant.

(Decided December 1st, 1890.)

Where a mortgagor of chattels, after default in payment of the mortgage debt, making the mortgagee's title and right to immediate possession absolute, stores the goods with a warehouseman, without the knowledge or assent of the mortgagee, the warehouseman has no lien on the goods for his storage charges as against the mortgagee.

Laws 1885 c. 526, giving a warehouseman a lien for his storage charges, etc., on the goods stored, was not intended to give such lien, as against the goods, when stored by another than the true owner, in fraud of the owner's rights.

The mere possession of the mortgaged chattels by the mortgagor after default does not enable him to bind the mortgagee, as representing him as bailee or agent, so as to make him liable for storage charges; especially where the warehouseman was not misled into trusting to a long-continued possession, and the delay of the mortgagee in taking possession was not in any sense fraudulent.

A warehouseman's lien has no precedence, on the ground that it is a common-law lien, over the lien of a chattel mortgage, which was also recognized at common law, and is not a mere statutory lien.

A warehouseman's lien on goods stored by the mortgagor thereof after a default, by which the mortgagee's title and right of possession have become absolute, cannot be sustained against the mortgagee on the ground that the storage was for the security and protection of the goods, where the mortgage expressly provided that they should not be removed from the place where they were when mortgaged.

Precedence should not be given to a warehouseman's lien for storage, over a prior chattel mortgage, as a matter of public policy.

APPEAL from a judgment of the District Court in the City of New York for the Ninth Judicial District.

The facts are stated in the opinion.

L. F. Post, for appellant.

J. C. Wolff, for respondent.

BOOKSTAVEN, J.—The action was brought to recover the possession of furniture claimed by the plaintiff under two certain chattel mortgages, on which the defendant claimed a

Baumann v. Post.

lien as a warehouseman. The judgment was based upon an agreed statement of facts, from which it appears that the plaintiff, a furniture dealer, on or about the 14th of December, 1888, sold and delivered to one Helen Funk, all the furniture in question, except one barrel-head couch, for the sum of \$329.50. Of this amount she paid \$40 in cash, and agreed to pay the remainder in instalments of \$20 on the 7th of each month thereafter until all was paid. To secure such payments, she executed and delivered to the plaintiff a chattel mortgage on the furniture so purchased. By the terms of this mortgage it was provided that, in case of default in the payment of the whole sum therein mentioned, or of any part thereof, or of either or any of the instalments, or in case any attempt should be made *to remove* or secrete, or sell or dispose of the goods or any of them from the house mentioned in the mortgage without the written consent of the plaintiff first obtained, then the whole amount expressed in the mortgage, less the amount already paid, should become due and payable, without demand, and if the sum so becoming due was not paid, it was provided that the plaintiff might take the goods wherever they were, and sell the same at public or private sale, to reimburse himself, etc.

The barrel-head couch was purchased of the plaintiff by Helen Funk on the 22d of December, 1888, for \$49.50, on which she paid \$1.00 and agreed to pay the sum of \$10 on the 8th of January, 1889, and the remainder on demand; to secure the payment of which, she gave the plaintiff a chattel mortgage containing the same provisions as to removal, etc., as were in the first mentioned mortgage.

A true copy of the first of these mortgages was filed in the register's office on the 18th of December, 1888, and a true copy of the second on the 14th day of January, 1889. Copies of both of these mortgages, together with a written statement indorsed on each, exhibiting the interest of the plaintiff in the property covered by each, was filed in the register's office within one year after the first filing, and there is no dispute but that these renewals were according to the statute in such case provided.

Baumann v. Post.

On the 3d of January, 1890, Mrs. Funk had paid the plaintiff on account of the first mortgage, including the cash payment of \$40 at the time of the purchase, the sum of \$154.30 only, leaving an unpaid balance of \$180.20, and consequently she had made default in the payment of the instalments as they became due, to the amount of \$100 and upwards, or in other words, was in arrears for more than five months' payments. She had never paid anything on account of the second mortgage, and consequently was in default on that mortgage, to the amount of \$10 agreed to be paid on the 8th of January, 1890.

On the 2d of January, 1890, Mrs. Funk, without the knowledge of the plaintiff and without his consent, caused all of the property in controversy to be removed from the house where she had agreed it should be kept, to defendant's storage warehouse, No. 1354 Broadway. Defendant then was, and for a long time before had been, a warehouseman, engaged in that business exclusively.

Plaintiff did not learn of the removal and storage of the furniture in question until the 1st of February, 1890. On the 3d of that month he demanded the same both from Mrs. Funk and the defendant. The former refused to deliver the goods to plaintiff, and the latter also refused so to do unless his bill for storage was first paid.

On this state of facts the appellant contends that he, as a warehouseman, has a lien upon the furniture in controversy for storage, as against the respondent, the mortgagee, and that the court below erred in awarding the possession of the property to the latter without his first paying the storage bill.

Several counsel were heard on behalf of the appellant, but none of them claimed there was any defect or weakness in the chattel mortgages on which the respondent relies for his title. Neither is it claimed they were fraudulent. They were duly executed for a valuable consideration, were properly filed, the refileing was within the time required by law, and the statement of the interest of the mortgagee was according to law. The validity of such mortgages has been

Baumann v. Post.

frequently adjudicated. The giving of them passed the title of the goods in controversy to the mortgagee, subject to be defeated by the performance of their conditions.

Default in the payment of the instalments is not disputed, and this, as well as the removal of the property from the house in which it was when mortgaged without the mortgagee's consent, made the whole amount remaining unpaid due at once, and the respondent's title and right to immediate possession, absolute. Both the default and the removal occurred before the goods came into appellant's possession as a warehouseman, and consequently respondent's title was perfect before a warehouseman's lien could by any possibility attach to them. Hence appellant is driven to the necessity of maintaining one of two propositions; either that his lien is superior to any other person's right whatever, whether owner or mortgagee after default; or that the mortgagor in default, being in possession of the mortgaged property, in some sense represents the owner as bailee or agent, and can bind him.

The first of these propositions is based upon the claim that chapter 526 of the Laws of 1885 gave a warehouseman a specific lien for the storage of goods deposited with him against the goods themselves, no matter by whom deposited and no matter who the owner might be. And the appellant cites, in support of this contention, *Stallmann v. Kimberley* (23 Abb. New Cas. 241), affirmed by the Court of Appeals (121 N. Y. 393). But an examination of this case shows that the only question considered was whether this law was intended to give a warehouseman, not only a specific lien on the goods then in store, for warehousing and advances of freight against those goods, but also a general lien for cartage, labor, weighing and cooping done by the warehouseman on other goods belonging to the owner which had been previously withdrawn. In the course of the opinion rendered by the General Term of the Supreme Court, several authorities were cited to show that a warehouseman had a specific lien at common law before the passage of the act, at least for warehousing and freight charges, in order to show that the law was not intended to give a specific lien only, but also a general lien; and there is

Baumann v. Post.

nothing whatever in it, or in the opinion of the Court of Appeals, to show that any question like the present was considered. The only point for determination in that case was whether warehousemen had a lien, not only for the charges against the specific goods stored, but also a general lien for a balance due on general account on other goods. The question now under consideration could not have been decided in that case, because there, there was no question but that the same persons were the owners of all the goods stored.

The act itself shows that it was intended to reaffirm the common law giving a specific lien for specific charges against specific goods, and also a general lien as stated above. There is nothing in it which, in my opinion, is intended to give a warehouseman a lien upon goods belonging to another, stored by a stranger in fraud of the true owner's rights. If such were the intention of the act, then a thief, storing goods, could create a lien on them as against the real owner, and to the extent of such lien could divest him of his right to his own property. To hold such a proposition would make a warehouseman a legalized receiver of stolen goods, at least to the extent of such charges.

The second proposition, I think is equally untenable. In *Speights v. Hawley* (39 N. Y. 441), it was held where a mortgagor of chattels, in possession of them, after default in payment of the mortgage debt, fraudently delivered them to a third person for sale, and that person as agent for the mortgagor sold the chattels and paid the proceeds to him, the third person was liable to the mortgagee for the value of the chattels, notwithstanding he acted in making the sale without reward, without knowledge of the mortgage, and in good faith. And this, I think, is conclusive of the argument advanced by the appellant, that the mortgagee, by allowing the mortgagor to remain in possession of the property after default in the payment of the instalments, made him the agent of the mortgagee so as to bind the latter for storage.

Besides, there is no evidence in this case to show that the appellant, at the time of receiving the goods, had any actual knowledge of the existence of the mortgages in question, or

Baumann v. Post.

that the mortgagor had been in possession of the property for a year or a day after default. He was not misled into trusting to a long continued possession; for it does not appear that he ever saw or heard of the property until the mortgagor came to him to have it stored. No one contends that the delay in taking possession of the property, after default, was in any sense fraudulent; it was merely such indulgence as tradesmen naturally give their customers. To hold that reasonable indulgence shall deprive the mortgagee of his security, would be to compel him by law to be harsh and exacting in all cases, by taking possession of the mortgaged property at the earliest opportunity.

But, again, chattels are not like mercantile paper, bankbills, money, etc. The mere possession of the former does not import assurance of title or authority to dispose of them, as is the case with the latter. There must be something more than mere possession, something giving such possession a specific character, indicative of authority or control. The possession in this case imported no more to the appellant than it would have done had the furniture been hired with the apartments, or loaned to the mortgagor.

If the mortgagor, instead of storing the property after default, had sold it, it could not be contented that the purchaser, although honest in his intentions and ignorant of the mortgage, would have acquired any title to the property as against the respondent. And why? Because such a person would not have been a purchaser in good faith without notice. The law regards the filing of the mortgage notice to all the world, and he who neglects to inquire at the proper office, does so at his peril. If this is true of a purchaser for value, why should it not apply to warehousemen?

To this appellant attempts several replies:

(1) That chapter 526, Laws 1885, gives a warehouseman this specific lien, even where the goods were stored by a stranger and not the true owner. This, I think, has already been sufficiently answered in considering appellant's first general proposition. In addition to what was then said, it may be remarked that appellant, in his argument, is forced

Baumann v. Post.

to the position that while a specific lien attaches to the goods without regard to ownership, yet the general lien could only attach to those goods provided the general account was against the true owner. And hence follows the anomaly that while no search in the proper office would be required for the specific lien, yet such a search would be necessary for the general lien if the warehouseman desired to enforce it against the true owner; and I fail to perceive why the legislature should make this distinction.

(2.) That the warehouseman's lien is a common-law lien and has precedence of a statutory lien. This assumes that a chattel mortgage is a mere statutory lien, which is not the fact. Chattel mortgages were recognized at common law, and the statute only intervenes to declare that such a security shall not be good as against subsequent purchasers and mortgagees in good faith unless the mortgage or a true copy thereof shall be filed in the office designated by law. They are therefore, both upon an equality, and the lien which is first obtained must have precedence.

(3) The neglect of the mortgagee to take possession of the chattels after default in the payment of the instalments, which it is claimed constituted the mortgagor an agent or bailee of the mortgagee so as to bind him. But, as already shown, this is not well founded.

(4) The storage being for the security and protection of the chattels, it was for the benefit of the mortgagee as well as of the mortgagor to store them, and therefore the lien should attach. In answer to this it is sufficient to say that the mortgagor did not store them for the benefit of the mortgagee, but for her own benefit. It is not shown that the storage of the goods was necessary for their preservation. On the other hand, the mortgage itself expressly provided that they should not be removed from the place where they were when mortgaged; it was the mortgagor's duty, if she had no further use for the goods, and desired them to be removed from those premises, to notify the mortgagee of that fact so as to give him an opportunity to take care of them. In face of the

Baumann v. Post.

stipulation it was a fraud upon his rights to attempt to remove them without his written consent.

Lastly, that a warehouseman's lien for storage should take precedence of a prior chattel mortgage as a matter of public policy. Questions of policy are for the legislature to determine, and not the courts. They are to be taken into consideration by courts only where the law is doubtful and the question of policy may aid in elucidating it. In this case I do not think there is any such doubtful question to be determined. But, even if there were, the considerations against allowing such a lien to be created by a stranger to the property, are at least as strong as those in favor of it. Warehouses are doubtless a great public convenience, but security of title to property is paramount to that. The inconvenience of requiring a warehouseman to make search in the proper office for chattel mortgages before taking the property for storage is not greater than it is to a person buying them; and it is safe to say that the purchasers of goods exceed warehousemen by a thousand-fold.

All the cases cited by the appellant rest upon the idea that the mortgagee, prior in point of time, in some way, expressly or by implication, consented to the mortgagor storing or making repairs to the goods, or is estopped from questioning it. But none of them are applicable to this case; and it is unnecessary to point out the differences in detail. It may, however, be proper to more particularly refer to one or two of the authorities cited. In *Scott v. Delahunt* (65 N. Y. 128), a shipwright had raised and repaired a canal boat sunk while in use by the mortgagor; the boat being still in his possession he brought an action to foreclose his lien for the repairs; it was shown that the mortgagee had knowledge of the making of the repairs while they were in progress, and did not object, and the action was sustained upon the express ground that the mortgagee had knowledge and had impliedly consented to such repairs. *Hammond v. Danielson* (126 Mass. 294), was a case of the mortgage of a hack let for hire by the mortgagor and described in the mortgage as "now in use;" in the mortgage it was stipulated that the mortgagor

Baumann v. Post.

might retain possession and use it; the defendant claimed a lien on it for repairs; the court regarded it as the manifest intention of the parties that the hack should continue to be driven for hire, and, to this end, kept in a proper state of repair, not merely for the benefit of the mortgagor but for that of the mortgagee, thereby preserving the value of the security and affording means to earn the money to pay off the mortgage debt. No such question arises in this case. In the subsequent case of *Storms v. Smith* (137 Mass. 201), the same court held that a claim for storage of mortgaged property was not a lien upon it, even though the mortgagee was informed of the storing and expressed no disapproval.

Appellant contends that a warehouseman's lien is analogous to that of a common carrier or an innkeeper. But he is mistaken in this, because a warehouseman is not bound to receive every article offered to him for storage; he has, as the carrier and innkeeper have not, a right of selection both of person and of property, and need take only those goods and from such persons as he chooses, and hence there is no reason why he should not take the ordinary precautions that others having the same right of choice are bound to do.

It has been held (28 N. Y. 252; 30 Hun 231) that a livery-stable keeper's lien was subordinate to a prior mortgage so far as the charges before the time of giving notice to the mortgagor are concerned, and arises only when such notice has been given. I think this is the proper rule to be applied to this case, although no notice is provided by the statute; it is clearly unfair to bind the mortgagee until he has had such notice and in some way acquiesces in the storage.

In my opinion therefore, the judgment appealed from should be affirmed, with costs.

ALLEN, J., concurred.

Judgment affirmed, with costs.

Benesch v. John Hancock Mut. Life Ins. Co.

ANTOINE K. BENESCH, Respondent, *against* THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, Appellant.

(Decided December 1st, 1890.)

Defendant was a foreign corporation, having an office in the City of New York, in charge of H. as manager. Plaintiff, seeking employment, on a reply received to his answer to an advertisement, called at said office, and was received by H., and referred by him to M., who entertained plaintiff's application, drew up a paper for him to sign, to be sent to the home office for approval, and engaged him in the meantime at a weekly salary, and demanded from him a deposit of money as security for the faithful discharge of his duty, which plaintiff paid. His application was not sent to or approved by the home office. *Held*, that it was not a defense to an action by him against the company for the salary agreed on and the deposit, that M. had no authority to hire others for the company, and that H. had authority only to receive applications for employment, and to hire such applicants as were approved by the company, as plaintiff did not know of this limitation of H.'s authority, which, as between them, was apparently general.

In such action, H., called as a witness by defendant to show the course of business at the office, the restrictions on his authority, etc., testified that he was manager of the company. He was not contradicted, and there was other evidence of similar action by him in other instances. *Held*, that this was sufficient proof of his agency.

APPEAL from a judgment of the District Court in the City of New York for the Seventh Judicial District.

The facts are stated in the opinion.

Langbein Bros. & Langbein, for appellant.

H. C. Kundlich, for respondent.

J. F. DALY, Ch. J.—The defendant is a foreign corporation having an office at No. 28 Union Square in the City of New York which is in charge of Mr. Hill, the manager for the defendant. The plaintiff, seeking employment, and seeing an advertisement in the *Staats Zeitung*, wrote to the said office and received a written reply, whereupon he called there and

Benesch v. John Hancock Mut. Life Ins. Co.

was received by the manager, Mr. Hill, who upon learning his business referred him to one Emil Miller as the "Superintendent for Staten Island." Miller entertained the application of plaintiff for employment, drew up a written paper for him to sign to be sent to the home office for approval, engaged him in the meantime at a salary of \$10 per week to solicit insurance for the company, and demanded from him \$100 as security for the faithful discharge of his duty, which sum plaintiff paid into the said office.

Plaintiff worked six weeks in procuring applications for insurance in the company, and received three weeks' wages, being the sum of \$30. His application was not sent to nor approved by the home office, and upon his failing to receive any further wages he brings this action to recover his \$100 deposit and \$30 balance of salary due.

The claim is resisted by the company on the ground that the plaintiff was employed by Miller and not by the company; that Miller was merely an agent to solicit insurance and collect premiums and had no authority to hire others; that Hill had no authority to hire agents except with the approval of the home office after written application submitted to it; that no person had authority to receive a deposit of cash as security, the only security received by the company being a bond; that the application of plaintiff was never received by nor sent to the home office; that defendant had no knowledge of the employment of plaintiff. The justice before whom the cause was tried gave judgment for the plaintiff for the full amount claimed, and the defendant appeals.

The judgment should be affirmed. The transaction through which the plaintiff was induced to part with his money and give his services to the company, under, as he believed, due employment by them, took place at the office of the company in New York, and, in effect, with the manager himself; for although all that Mr. Hill, the manager, did was to refer the plaintiff to Mr. Miller, yet as this was done with full knowledge of the plaintiff's application for employment and that he came to that office pursuant to an advertisement and a letter apparently issuing from it, whatever Miller did in

Benesch v. John Hancock Mut. Life Ins. Co.

respect of the plaintiff's application was as much the act of Hill as if the latter personally transacted the whole business. The plaintiff, having first applied to Hill and being referred by the latter to Miller without any notice that Miller was acting on his own behalf, had a right to assume that Miller was acting for Hill. Miller was an agent of the company, with limited powers which did not include the hiring of others, but the plaintiff dealt with him because referred to him by Hill, and the plaintiff's right of recovery does not depend upon Miller's authority, but upon Hill's.

Hill's power to employ agents was, it seems, restricted by the company to receiving and forwarding written applications for employment and the hiring of such applicants as were thereafter approved by the company. The plaintiff, however, did not know of this limitation upon Hill's authority. He knew that he had to sign a written application, and he did so; but whether Hill had power to employ him temporarily pending the approval by the home office, and whether Hill had authority to accept and receive at the time of the application a cash deposit as security, he did not and could not know. All he knew was that he was invited to come to the office of the defendant's manager to obtain employment, that he went there pursuant to such invitation and there found the manager, who referred him to another person who assumed to employ him in the regular course of business and set him to work. The case resembles in its principal features *Cox v. The Albany Brewing Co.* (10 N. Y. Supp. 213, 31 N. Y. St. Rep'r 666). There the plaintiff was employed for one year, by one Gray, an agent of the corporation, who had no authority to hire men for longer than a day at a time, but the court sustained a recovery upon the contract on the principle that although a special agent with limited powers cannot bind the principal where he acts outside the scope of his authority, yet the rule is subject to the qualification that when an agent is entrusted to do a particular kind of business he becomes, as between the principal and parties dealing with him, the general agent for the transaction of that business; and his acts, as between his principal and strangers in that partic-

Benesch v. John Hancock Mut. Life Ins. Co.

ular line, will bind the principal, although he violates some private instruction given by his principal not known to the public. It was held that as Gray had authority to hire hands such authority, as between the defendant and strangers dealing with him in that line, would be general unless the limitation or qualification of his authority was made known to persons whom he employed in the service of the defendant, and that as between the parties Gray was the ostensible agent of the defendant and clothed with all the power he assumed to exercise.

In this case Hill, who was manager of the company, had authority to receive applications and to employ agents. It was not known to the plaintiff that the authority to employ did not exist until the company had approved the applications which Hill was authorized to receive. If Hill exceeded his authority and employed persons pending the approval of the application and they performed work for the company upon conditions fixed by Hill, they are not to suffer because of the undisclosed limitations upon Hill's authority. As between Hill and the plaintiff, his apparent authority was general. In the case quoted, the General Term of the Third Department (May, 1890), cites the language used in the opinion in 1st N. Y. 292: "Incorporated companies, whose business is necessarily conducted altogether by agents, should be required at their peril to see to it that the officers and agents whom they employ not only know what their powers and duties are, but that they do not transcend their powers. How else are third persons to deal with them with any degree of safety?" and "the public have no means of judging in a particular instance whether the officer is or is not within his prescribed limits." And the court say: "The plaintiff had a right to assume that the person at the office who assumed to employ laborers had authority to act in that capacity, and it has been held that a jury may presume the authority in such a case from an act apparently done in the usual course of business at the office of the company, without the evidence of actual knowledge on the part of the company or its directors, or of express ratification."

Blake v. Voight.

The appellant contends in his brief that there is no proof that Hill was manager of the company, or that his office was the office of the company. This can hardly be seriously argued in face of Hill's repeated and uncontradicted testimony that he was manager of the company, and in view of the fact that the defendant called him as its own witness to show the course of business at the office, the restrictions upon his authority imposed by the defendant, etc. It was further proved that a cash deposit had been received at the office, and apparently with the knowledge of Hill, in a previous case, and that other persons had been employed as the plaintiff had been, and had made deposits and had been paid wages at the office.

None of the authorities on the question of agency conflicts with the cases cited and relied upon, and none of the exceptions calls for reversal.

The judgment should be affirmed.

BISCHOFF and PRYOR, JJ., concurred.

Judgment affirmed.

FREDERICK D. BLAKE, Respondent, *against* CARL VOIGHT
et al., Appellants.

(Decided December 1st, 1890.)

An agreement in writing, dated November 27th, 1888, was by its terms "to take place and effect December 1st, 1888, for one year." *Held*, that it was not within the statute of frauds, as an agreement which by its terms was not to be performed within one year "from the making thereof," and was therefore not invalid, although not subscribed by the parties to be charged therewith.

Defendants, having agreed to pay plaintiff commissions on consignments of goods to them for sale "influenced" by him, for one year, terminated the contract, pursuant to a condition therein, before the end of the year. *Held*, that plaintiff was entitled to commissions on goods consigned and received before such termination of the agreement, although not then sold.

Defendants, in the progress of the business, had paid plaintiff on separate consignments. *Held*, that, having thus treated the contract as severable, they could not defeat his action for other commissions by setting up that the contract was entire.

Blake v. Voight.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered on the verdict of a jury and an order denying a motion for a new trial.

The facts are stated in the opinion.

Charles E. Hughes, for appellants.

C. Bainbridge Smith, for respondent.

PRIOR, J.—Appeal from a judgment of the General Term of the City Court affirming a judgment on a verdict and an order denying a motion for a new trial.

Action to recover a percentage of commissions on consignments of goods for sale by defendants as factors.

The complaint founds the cause of action on an express contract; and the defense is that the agreement was void under the statute of frauds, because “by its terms not to be performed within one year from the making thereof.” (2 Rev. Stat. 135, § 2).

It appears that the result of the negotiations between the parties was embodied in a paper which exhibits the terms and conditions of their agreement, but which was not signed by defendants. This paper was dated 27th November, 1888, and by its terms was “to take place and effect December 1st, 1888, for one year.” The contention of counsel for appellants is, that the contract is void on its face, because expressly incapable of performance within a year; and he supports his position by an argument of unusual ability and research—to which argument, however, both counsel for the respondent and the court below are content to reply merely that “the statute of frauds is inapplicable.” But, if, as seems to be conceded by that court and counsel, the contract was made on the 27th of November, 1888, and was to continue for one year from the 1st of December following, the statute is not only applicable, but is a complete bar to the action. In terms, the contract was to continue “for one year;” but, one year from when? Whether from 27th of

Blake v. Volght.

November or 1st of December, is immaterial; for, in either event, it was to subsist only for a year, and so was valid, although not subscribed by defendants, "the party to be charged." An alternative construction remains: namely, that the agreement was made on 27th of November and was to continue for a year from the 1st of December following—upon which hypothesis the contract would be plainly invalid. But, was the contract made on the 27th of November? The language is: "this agreement to take place and effect December 1st, 1888." In effect, on 27th of November, the parties say: "this is the contract we intend to make, but we postpone making it till 1st of December." Thus, the contract had its inception on 1st December; was then for the first time an effectual instrument; and prior to that period was inchoate and ambulatory. In other words, though the minds of the parties were at one on 27th of November, the agreement did not "take place" till the 1st of December. Although on the 27th of November the terms of the anticipated agreement were reciprocally acceptable to the parties, they expressly deferred the "making" of it until the 1st of December. Prior to December 1st, the contract existed merely in contemplation and expectation; then only did it become an operative actuality—and so "from the making thereof," performance was not suspended for more than "one year." Since the parties *ex industria* have inserted in their contract an express provision that it is "for one year," I cannot infer that it has a longer duration.

But, supposing the language of the instrument to be equivocal, *ut res valeat* it will be construed to run from the 1st of December rather than from the 27th of November, as thus the right will be upheld instead of being defeated.

I conclude that the agreement sued on was, by its terms, to be performed within a year "from the making thereof," and so was valid, although not "subscribed by the party to be charged therewith."

In the other points of appellants we perceive still less merit.

(1) Pursuant to a condition in the contract, defendants

Blake v. Voight.

terminated it on the 3d of June, 1889; and they now contend that plaintiff is not entitled to a percentage of commissions on goods unsold when the contract ended, although consigned and received before. The agreement was that plaintiff was to be paid for the consignments which he "influenced;" and it is not disputed that his "influence" directed the consignments in question to defendants. In the strictest sense of the contract plaintiff had earned his reward by rendering the stipulated service; and the defendants could not, by an arbitrary exercise of their option, deprive him of the compensation to which he had already entitled himself. In *Warren, etc., Manuf. Co. v. Holbrook* (118 N. Y. 586), the contract reserved to a party the right "to terminate it at any time;" but the court said (p. 592) "the right to terminate had one limitation—the time of its exercise was subject to the ordinary requirements of good faith,—after the contract was obtained, and the agent's right to profits assured, it could not be put at end in bad faith and for the sole purpose of depriving him of its profits." This was predicated of a reward yet to be earned, but here the plaintiff has earned his compensation by performance of the agreed service.

(2.) Appellants contend further, that the agreement is entire, and that no cause of action for a percentage of the commissions accrued until the close of the business between the parties. But, defendants had treated the contract as severable by payments to plaintiff in the progress of the business, and "there is no better way of seeing what the parties intended, than seeing what they did under the instrument in dispute" (*Chapman v. Bluck*, 4 Bing. N. C. 187, 193).

(3) The exceptions to the evidence are obviously untenable.

The judgment should be affirmed, with costs.

J. F. DALY, Ch. J., and BISCHOFF, J., concurred.

Judgment affirmed, with costs.

Olenighan v. McFarland.

ROBERT CLENIGHAN, Appellant, *against* WILLIAM C. MCFARLAND, Respondent.

(Decided December 1st, 1890.)

An agreement by a lessor, before or at the time of making a written lease, and as a condition on which the lessee hired the premises, that they should be put in thorough repair before the commencement of the term, being collateral to the lease, may be proved and enforced although not reduced to writing nor incorporated in the lease.

The amount paid by the lessee for rooms and meals at a hotel for the time that the premises were untenable, while the repairs were in progress during the term, is not recoverable by him as damages for breach of such agreement; the measure of his damages is the value of the use of the premises during the time they were so rendered untenable.

APPEAL from a judgment of the District Court in the City of New York for the Eleventh Judicial District.

The facts are stated in the opinion.

Matthew Daly, for appellant.

Gratz Nathan, for respondent.

J. F. DALY, Ch. J.—The action was brought to recover the sum of \$208.33 for one month's rent of the house and premises 3 East 27th Street under a lease for a term of two years commencing May 1st, 1890, made by Mrs. Pfaff to the defendant, at an annual rental of \$2,500, payable monthly in advance. This action is for the first month's rent, and the cause of action was assigned to the plaintiff June 1st, 1890. The defendant interposed a counterclaim for damages for the breach of an agreement made by the landlord with him before or at the time of taking the lease, by which the lessor agreed as a condition upon which the defendant hired the premises that they should be put in thorough repair before the commencement of the term. The justice found that such an agreement had been entered into by the landlord, that the premises were not

Olenighan v. McFarland.

put in thorough repair by the time agreed upon, and that the damages of the defendant by reason of such breach equalled or exceeded the rent sued for, and gave judgment accordingly for the defendant.

The appellant urges as a ground of reversal that the evidence of a verbal agreement to put the premises in repair was not admissible, it being an attempt to modify or vary the written lease. In this he is mistaken. The agreement was collateral to the written lease and may be proved and enforced although not reduced to writing nor incorporated in the lease (*Chapman v. Dobson*, 78 N. Y. 75). It is only such matters as concern a subject embraced in and covered by the terms of the lease that must be incorporated in it, and that are deemed to be waived if not so incorporated, although they may have been the subject of prior negotiation and agreement between the contracting parties. Had this been an agreement on the part of the lessor to make repairs, or to keep the premises in repair during the term, it would have fallen within this rule, but an independent agreement to put the premises in repair before the term, and made as a condition of or consideration for the taking of the lease, stands upon a different footing. Similar agreements have been held to be collateral and are cited by the court in the case referred to. In *Mann v. Nunn* (43 L. J. C. P. 241), where a lessor promised that, if the proposed lessee would take a lease of a house, he would put the house in a state fit for occupation, the promise was held to be collateral to the written lease and provable by parol evidence for the purpose of recovering damages for a breach of it.

There was substantially no dispute as to the alleged agreement to put the house in repair, although there was a conflict of evidence as to the amount of repairs agreed to be done and as to whether the delay in making the repairs, stipulated for under the agreement, was delayed by the act of the tenant in requesting additional work to be done. We are to assume from the judgment in the case that the justice found upon all these issues in the defendant's favor, and his conclusion would not be disturbed if there were no error committed in the trial of the other issues.

Levin v. Standard Fashion Co.

It seems, however, that the defendant mistook the rule as to the damages he would be permitted to prove under his counterclaim. He was allowed, against the objection of the plaintiff, to show what he paid for rooms and meals at the St. James Hotel during the period that the demised premises remained untenable while the repairs were in progress. This was improper. The measure of his damage was the value of the use of the premises during the time they were rendered untenable by reason of the defendant's failure to complete the repairs (*Myers v. Burns*, 35 N. Y. 269; *Hexter v. Knox*, 63 N. Y. 561).

The defendant did prove the rental value of certain rooms on the upper floors amounting to \$150. From the judgment being in his favor we must assume that the justice allowed for the other items of damage improperly admitted, and for this error the judgment will have to be reversed and a new trial ordered, with costs to abide the event.

BISCHOFF and PRYOR, JJ., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

ELIZABETH LEVIN, Plaintiff, against THE STANDARD FASHION COMPANY, Defendant.

(Decided December 1st, 1890.)

Plaintiff, while in the employ of defendant under a hiring for a year at a salary payable weekly, on the day before the expiration of a week, had an altercation with defendant's superintendent, during which he assumed that she resigned her employment; but this she, at the time, explicitly controverted. On the next day, and several days following, she offered to do her work, but was not permitted to resume work. Her salary for that week not having been paid, she brought an action against defendant for "wages," in which defendant admitted an indebtedness of an amount less than the week's salary, and paid the sum into court; and, upon proof of the contract, the value of the services not being litigated, plaintiff recovered the amount of her salary for one week. *Held*, that the judgment was for wages due on the contract, and was not a bar to a subsequent action for breach of the contract by dismissing plaintiff.

Levin v. Standard Fashion Co.

In such action for damages for dismissal, it appeared that defendant's superintendent had called plaintiff a thief; had accused her of lying, and shaken his fist at her; had used violent language to her; had laughed and jeered at her; had put her out of the office in which she worked; and had brought a policeman to stand guard over her. *Held*, that she was not bound to accept an offer of re-employment by defendant, and such offer was not available to reduce the damages; and plaintiff was not precluded from showing such reason for refusing the offer by the fact that, when it was made, she rejected it because not in accordance with the original contract.

APPEALS from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered on the verdict of a jury and orders denying the motions of both parties for a new trial.

The facts are stated in the opinion.

Theo. N. Melvin, for plaintiff.

A. C. Shenstone, for defendant.

PRYOR, J.—Both plaintiff and defendant appeal from a judgment of the General Term of the City Court affirming a judgment on a verdict and orders denying a new trial as moved by each party. The action is for damages for breach of a contract of employment. The contract is conceded; and on this appeal the verdict of the jury in favor of plaintiff is conclusive of the breach by defendant (*Arnstein v. Haulenboek*, decided this term, *ante*, p. 382).

As to defendant's appeal, the facts essentially bearing on the question for decision are: That defendant hired plaintiff for a year, at a salary payable weekly; that she was duly paid except for the week she was discharged; that on Friday, the day before the expiration of the week, she had an altercation with defendant's superintendent, during which he assumed that she resigned her employment, but which assumption she then explicitly and persistently controverted; that the next day, Saturday, she went to the office of defendant and said to the president, "I come to do my work, I am ready to do my work;" to which he replied that "he wanted nothing what-

Levin v. Standard Fashion Co.

ever to do with me ;" that she continued to go to the office for several mornings with offers to resume work, but he answered her as on Saturday, that " he wanted nothing to do with her."

The contention on the trial was whether plaintiff had resigned or had been discharged ; but in this court, the verdict for plaintiff concludes the question in her favor. Both by plea and proof, the defendant interposed the defense of former recovery ; and the question is, was the defense sustained ? The plaintiff had recovered a judgment against defendant in a district court, and the precise point in controversy is whether that judgment was for wages due by the contract of hiring, or for a *quantum meruit* or damages for breach of contract ? For, if the recovery in the district court was for an instalment of the stipulated salary due by the terms of the contract, it is no bar to this action for general damages for breach of the contract (*Perry v. Dickerson*, 85 N. Y. 345). On the other hand, if the recovery in the district court were upon a *quantum meruit* for the value of services rendered, or for damages for breach of contract, then the judgment in that court operates as an estoppel in this action (*Moody v. Leverich*, 4 Daly 401, 408). Now, to ascertain what was determined in a former action, " it is proper to look beyond what appears on the face of the judgment, to every allegation which, having been made on one side and denied on the other, was at issue and determined in the course of the proceedings " (*Griffin v. Railroad Co.*, 102 N. Y. 449, 452; *Bell v. Merifield*, 109 N. Y. 202).

Adverting to the pleadings and evidence in the district court, we see that the action was on the contract (" contract admitted in evidence "); that the value of the services was not litigated ; that plaintiff's claim was " for wages " *eo nomine*, and not for damages for the wrongful discharge ; and that her recovery was of the \$25 stipulated to be paid her for one week's services. That the action was tried as involving a claim for " wages " due and payable, is conclusively evident by the express admission of defendant of " an indebtedness of twenty dollars due plaintiff " ; and by the pay-

Levin v. Standard Fashion Co.

ment of that sum into court. Plaintiff declined to accept the sum offered, claiming an indebtedness of \$25 for an entire week's service. Upon this claim the litigation proceeded—the defendant contending that plaintiff abandoned work on the afternoon of Friday, 9th December, and plaintiff contending that she rendered service every day of the week (including Saturday, 10th December), for which she claimed compensation. Upon this conflict of evidence the justice gave judgment for plaintiff for \$25—a week's wages—and I hold that the judgment so rendered is a conclusive determination that the action was for an instalment of salary, and that the wages had been earned by a due rendition of service. The uncontradicted evidence is, that she was at her place of business every day of the week (including Saturday) for which she claimed the salary; and if defendant forbade her to work on Saturday, that would not defeat her recovery of the week's wages (*Vail v. The Company*, 32 Barb. 564, 567). The case is distinguishable from *Moody v. Leverich* (*supra*), in the essential circumstance that there the judgment in the former action could have been had only on the ground of a recovery for damages—since upon the conceded facts the plaintiff had not worked for the period requisite to entitle him to an instalment of salary; whereas here the plaintiff rendered full service on every day of the week except Saturday, and on that day she repaired to her place of business and tendered her services. It was work for her to go to defendant's office—her place of business—and the defendant could not defeat her recovery for a week's wages by refusing her services for a part of the day. The law takes no account of fractions of a day. At all events, upon this point, namely, that plaintiff had earned the week's salary, the judgment of the district court is *res adjudicata*; and is not here open to contradiction (*Blair v. Bartlett*, 75 N. Y. 150; *Smith v. Hemstreet*, 54 N. Y. 644).

Furthermore, the judgment in the district court, introduced by the defendant, is conclusive evidence in this action that the plaintiff had not been discharged on the 9th of December: for, had she then been discharged she could not have recovered

Levin v. Standard Fashion Co.

for wages for the week ending on the 10th of December (*Moody v. Leverich, supra; Howard v. Daly*, 61 N. Y. 362). "Whatever was requisite to be proved and established as facts by plaintiff in order to obtain judgment is, so long as the judgment remains unreversed, *res adjudicata* between the parties, and conclusive upon them" (*Blair v. Bartlett*, 75 N. Y. 150).

The verdict of the jury in plaintiff's favor, determines that she has the right and justice of the case; and if she is to be defeated of her dues by a technical defense, that defense must be clearly established. "The burden of proof is upon the party claiming an estoppel by a former judgment, to show clearly that the fact in issue was determined in the former action" (*Zoeller v. Riley*, 100 N. Y. 102). It is not apparent that in the action in the district court plaintiff recovered anything upon a *quantum meruit* or on account of damages for breach of contract; and accordingly, the defense of *res adjudicata* fails.

As to plaintiff's appeal, there must be another trial of the action, because of error in the judge's charge. It was in evidence that, after the dismissal of plaintiff, an offer was made to take her back in the service of defendant, upon the conditions of the original contract,—except that the term of service was to be from the date of the offer, 13th of January, 1888, instead of from the time of her dismissal, the 9th or 10th of December, 1887. (Upon the evidence it was questionable on which of these days her dismissal definitely took effect). This offer the plaintiff rejected, on the sole ground that the proffered employment "from to-day on" was not in accordance with the original contract, which was an agreement on the same terms from the 27th of June, 1887, to the 27th of June, 1888. It is unquestionable law, that a servant wrongfully discharged, must make reasonable endeavor to obtain other employment, and that in an action for his wrongful discharge his damages are to be reduced by the sum that he has earned in other employment, or that he might have earned by reasonable effort (*Polk v. Daly*, 4 Daly 41). But, the discharged servant is under no obligation to accept an employment of a

Levin v. Standard Fashion Co.

different nature from that for which he contracted, or in a different locality from that in which he contracted to work; nor to accept employment from a person to whom there is reasonable ground of objection (8 Wait's Actions and Defenses, 301, *Strauss v. Merteef*, 64 Ala. 299).

Now, it was in evidence that defendant's superintendent (i. e., the defendant corporation itself) had treated plaintiff in the most brutal manner—had called her a thief; had accused her of lying; had shaken his fist at her; had used violent language to her; had laughed and jeered at her; had put her out of the office, and had a policeman to stand guard over her.

After the wrongful dismissal of an employe, the employer has a *locus pœnitentiæ*, and may reduce the damage to his servant by an offer of re-employment (*Bigelow v. Company*, 89 Hun 599; INGRAHAM, J., in *Thompson v. Weed*, 1 Hilt. 96; ROBINSON, J., in *Polk v. Daly*, 4 Daly 415). But, such offer is ineffectual to reduce damages unless the discharged servant be bound to accept it; and such offer the discharged servant is not bound to accept from a person to whom there is a reasonable ground of objection. (*Strauss v. Merteef*, 64 Ala. 299; 8 Wait's Actions and Defenses, 301).

And, surely, it is unnecessary to argue the proposition, that after the cruel treatment of plaintiff by defendant's superintendent, she was under no obligation to resume work and habitual association with a person of such morals and such manners. Upon the evidence, therefore, the jury might have found that the superintendent's misbehavior to plaintiff disentitled defendant to reclaim her services; and so that her rejection of its offer was inoperative to reduce the amount of her recovery. But, by the peremptory rulings of the court, the jury were not allowed to say whether defendant's conduct towards plaintiff justified her rejection of its offer; and upon the assumption that she was bound to accept the offer, the amount of her recovery was diminished by the sum she would have earned if she had accepted the offer.

By its seventh instruction, the court charged the jury that "plaintiff was bound to accept such re-employment, and thus

Myers v. Metropolitan El. R. Co.

keep down the damages for the breach;" by its eighth instruction, that "plaintiff, by stating the ground upon which she refused to render her services to defendant, waived all other ground;" and finally the court charged that "all plaintiff can recover is \$150.48;" whereas, had she not been charged with what she would have earned by acceptance of the offer, the amount of her recovery would have been \$468.33.

Plaintiff duly excepted to these rulings; and whether they be correct or not depends upon the question whether, by stating one ground for rejecting defendant's offer of re-employment, she was precluded from showing, at the trial, another valid reason for refusing the offer. I am aware of no authority for the ruling of the court below; while *Strauss v. Merteef* (64 Ala. 299, 302, 309), is a distinct and decisive authority to the contrary.

The judgment must be reversed and a new trial ordered, costs to abide the event.

J. F. DALY, Ch. J., and BISCHOFF, J., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

**EDWARD MYERS, Respondent, against THE METROPOLITAN
ELEVATED RAILROAD COMPANY *et al.*, Appellants.**

(Decided December 1st, 1890.)

An order granting leave to serve a supplemental complaint and allowing defendant a certain time thereafter to answer, is not erroneous because it fails to provide for a demurrer; as a demurrer to a supplemental complaint is not authorized by the Code.

In granting leave to serve a supplemental complaint, the case having been on the calendar more than a year, it is within the discretion of the court to provide that the case shall retain its original date of issue, its number on the calendar, and its position on the day calendar.

Myers v. Metropolitan El. R. Co.

APPEAL from an order of this court granting leave to serve a supplemental complaint.

The facts are stated in the opinion.

Davies & Rapallo, for appellants.

Abbett & Fuller, for respondent.

BOOKSTAVEN, J.—The motion for leave to serve the supplemental complaint was granted on notice to the defendants, and the order recites that no objection was made to the motion. The appeal is taken from so much of the order as required the defendants' pleading to the supplemental complaint to be an answer, and from the provisions in the order that no new notice of trial should be served, that the action as continued should retain its original date of issue, its old number on the calendar, and its position on the day calendar.

The first ground of appeal we do not think is well taken. There is no provision in the Code which authorizes a demurrer to a supplemental complaint. Four sections of the Code are devoted to the subject of demurrers: § 492 provides for a demurrer to the whole complaint or to any cause of action, § 493 provides for a demurrer to a reply, § 494 provides for a demurrer to an answer, and § 495 provides for a demurrer to a counterclaim where the defendant demands affirmative judgment. None of these provides for a demurrer to a supplemental complaint, as was decided in *Freicks v. Caster* (17 Rep'r 168); *Fleischman v. Bennett* (1 Law Bul. 493). And the reason for this is obvious. As a general rule, supplemental complaints do not state a cause of action; they are confined, by § 544 of the Code, to matters occurring after the original complaint was drawn, or of which the pleader was ignorant when it was made. In this case the supplemental complaint merely sets up an assignment by one of the original plaintiffs of his interest in the cause of action, to the other, after the action was commenced, to show the present interest of one of the plaintiffs in the entire cause of action. In *Hayward v. Wood* (44 Hun 129), Justice VAN BRUNT

Myers v. Metropolitan El. R. Co.

says :--“ As the supplemental complaint did not pretend to set out an independent or different cause of action from that contained in the original complaint, it was to be read as part and parcel of the complaint, and if the two complaints contained a cause of action which was not demurrable, an answer upon the part of the defendants was required. It would seem, therefore, that no issue was raised by the demurrer to the supplemental complaint, that not being a complete complaint in itself, and that it was error to entertain such demurrer.” It was not necessary, therefore, that the order should provide for a demurrer in this case.

But even if the defendants' contention is right, that they should have had an opportunity to demur to the supplemental complaint, the order did not prohibit them from so doing. If the Code authorizes such a pleading, there was no need to insert it in the order. It is plain, if the order in this case had stopped on granting the plaintiff leave to serve the supplemental complaint, the defendant would by the Code have been allowed twenty days within which to answer it, without any provision in the order, and the same is true of a demurrer.

The terms on which a supplementary complaint will be allowed are largely within the discretion of the court permitting it (Code Civ. Pro. § 544); and we do not think the court below abused its discretion in this case. Even had the motion been opposed, the terms upon which it would have been granted would still have been within the discretion of the court.

A distinction must be made between an amended complaint and a supplemental complaint. An amended complaint takes the place of the original, but a supplemental one does not. When an amended complaint is served, it supersedes the original for the purposes of the issues in an action. A supplemental complaint, however, never takes the place of an original; the issues joined under the original pleadings remain as issues to be tried in the action. And as a general rule, a supplemental complaint does not state a cause of action. In this case the supplemental complaint was allowed

Regan v. Luthy.

to be served merely to show the present interest of one of the original plaintiffs to the entire cause of action; whereas when it was commenced he was only a part owner of it. It has been held that even where an amended complaint is allowed to be served it is within the discretion of the court to require a new notice of trial and a new note of issue or not (*McBride v. Langdon*, 19 Civ. Pro. Rep. 41; *Ingraham v. Sterling Ins. Co.*, MSS. in this court). In our judgment, it was in the interest of justice to allow this case to remain on the calendar, where it had been for over a year, and not to require a new note of issue or a new notice of trial.

I think, therefore, the order appealed from should be affirmed, with costs.

BISCHOFF and PRYOR, JJ., concurred.

Order affirmed, with costs.

JAMES REGAN, Respondent, *against* ADOLPH LUTHY, Appellant.

(Decided December 1st, 1890.)

A tenant of a house from year to year removed therefrom before the expiration of the year, and securely closed the premises, but, within a few days thereafter, the plumbing work was cut out and stolen by persons unknown. *Held*, that this was commissive waste, for which the tenant was liable to the landlord, although the act of strangers.

APPEAL from a judgment of the District Court in the City of New York for the Ninth Judicial District.

The facts are stated in the opinion.

William King Hall, for appellant.

Daniel M. Van Cott, for respondent.

egan v. Luthy.

BISCHOFF, J.—Plaintiff was lessor and defendant lessee of the premises 51 East 129th Street in the City of New York, the term of letting being from year to year, and the year expiring May 1st, 1890. About March 8th, 1890, the defendant moved out and securely closed the premises against the intrusion of persons without his consent. Within a few days thereafter, the plumbing work was cut out and stolen by persons unknown.

When plaintiff again became possessed of the demised premises he caused the plumbing work to be replaced, and thereupon brought this action to recover the sum claimed to have been necessarily expended by him for that purpose. On the trial there was no dispute as to the fact of letting, and the removal of the plumbing work in the manner above stated, and after being duly charged by the trial justice the jury rendered a verdict in favor of the plaintiff. Judgment was thereupon duly entered, from which defendant appealed. The only alleged errors assigned by defendant as grounds for reversal are to be found in the charge to the jury, and the justice's refusal to charge as requested by the defendant.

The alleged error in the charge is that portion thereof, where the justice says, "if you believe the evidence of the plaintiff your verdict will be for the plaintiff." To this defendant's counsel excepted, and the trial justice thereupon corrected his charge, by stating that he desired to be understood as saying, that if the jury believed the evidence as adduced by the plaintiff, the verdict should be for the plaintiff; to which correction the defendant's counsel again excepted. Defendant's counsel also requested the court to charge that in respect to the property stolen the defendant was bound only for ordinary diligence, and that it was sufficient to exonerate the defendant from liability for the stolen property "if the defendant used as much care and diligence for the safety of the property, as is usual with the common run of men or with men of ordinary discretion, in managing their property," and "that the defendant is not responsible for the condition of the house, unless it was put in that condition by his own fault or negligence."

Regan v. Luthy.

Defendant's counsel further requested the trial justice to charge, that if the defendant "left the house in the same condition as the owner of the property would have left it, and while in that condition the property was stolen, the defendant was not liable."

All of these requests were refused, and to such refusals the defendant's counsel also duly excepted.

It is apparent from the exceptions and the requests that the defense proceeded upon the theory that the facts adduced to substantiate plaintiff's claim constituted what is termed permissive waste, and that therefore negligence of the defendant in permitting the injury to plaintiff's property complained of, being the gist of the action, must be proved, and that without such proof the defendant is not answerable; and, indeed, the brief for the defendant upon this appeal, is almost entirely devoted to substantiate that view. In this however, the counsel for the defendant is mistaken. *Permissive waste* consists in the negligent or willful omission to do what is required to prevent an injury to demised premises: as, to suffer the demised premises or a part thereof to go to decay for the want of repairs. *Voluntary or commissive waste*, consists of injury to the demised premises or some part thereof, when occasioned by some deliberate or voluntary act: as, for instance, the pulling down of a house, or the removal of wainscots, floors, benches, furnaces, windows, doors, shelves, or other things fixed to and constituting a material part of the freehold (See Washburn on Real Property p. 126 ¶ 2; 2 Bouvier's Law Dict. p. 654, "Waste").

The mere statement of these definitions will be sufficient to make it clear that the injury to the freehold complained of in this action falls within the class known to the law as commissive waste. I apprehend, however, that defendant's counsel will contend that because it does not appear that the injury for the recovery of damages for which this action was brought was shown to have been committed by the defendant or by his direction or by his agents or servants, commissive waste was not established. But it was not essential to the recovery that such proof should have been made; for though

Regan v. Luthy.

the acts complained of were committed by strangers the defendant was none the less liable (1 Washburn, Real Property, p. 135 ¶ 34 and 35; *Cook v. Champlain Trans. Co.*, 1 Denio, 104).

And being so liable, the fact that he was a tenant for one year, or from year to year only, does not deprive the plaintiff of his right of redress against him. There appears to be some doubt as to whether a tenant at will, or from year to year, may be liable for permissive waste, and in support of his claim that such an action is not maintainable against that class of tenants, defendant's counsel cites *Herme v. Bembow* (4 Taunt. 764). The English law in that respect does not appear to have been followed in this country, at least not in the states of New Jersey and New York (See *Newbold v. Brown*, 44 N. J. L. 266; *Phillips v. Covert*, 7 Johns. 4).

The facts in this case, however, constituting, as above stated, commissive waste, there can be no question as to the plaintiff's right to maintain this action, since in such a case all tenants are alike answerable (See Wood's Landlord and Tenant, p. 710 § 425, and cases cited).

It would therefore have been proper upon the evidence for the trial justice to have directed a verdict for the plaintiff, leaving the damages only to be assessed by the jury (*McGregor v. Brown*, 10 N. Y. 117).

For the reasons above stated, the defendant's exceptions taken upon the trial in the court below are insufficient to warrant a reversal. The judgment appealed from should be affirmed, with costs.

J. F. DALY, Ch. J., and PRYOR, J., concurred.

Judgment affirmed, with costs.

Roeding v. Sons of Moses.

LOUIS ROEDING, Respondent, *against* SONS OF MOSES,
Appellant.

(Decided December 1st, 1890.)

The secretary of a benevolent society, although not authorized by its constitution or by-laws to accept payment of dues from members, habitually received such dues, which he paid over to the society. *Held*, that the society was thereby estopped to deny his authority to accept dues tendered by a member, but refused by him on the ground of want of authority ; and that such tender was legally equivalent to payment, so as to render the society liable for the benefit payable on the death of such member, as a member "clear in the books" under its by-laws ; he having died before any subsequent meeting of the society or its directors at which the dues might properly have been paid.

APPEAL from a judgment of the District Court in the City of New York for the Sixth judicial District.

The facts are stated in the opinion.

W. R. Spooner, for appellant.

L. S. Phillips, for respondent.

PRYOR, J.—Appeal from judgment of a district court in favor of plaintiff.

Action by an assignee, to recover of defendant, a benevolent society, \$250, to which the assignor claimed to be entitled as widow of a deceased member of the society. The claim was valid, if the deceased member had complied with provisions of the society's by-laws, now to be considered.

Art. IV. sec. 1, "Each member shall pay \$4 dues at the end of each quarter, in the months of March, June, September, and December, or in the following meeting of the directors."

Sec. 4. "A member who fails to pay his dues at the legally specified time forfeits all claims on the society, with the exception of the burial ground. He is entitled to all rights as soon as he is clear in the books."

Roeding v. Sons of Moses.

Art. XIII, sec. 1. "The regular general meetings shall take place on a Sunday in the middle of the months of December, March, June, and September. There shall also be held a board meeting monthly."

It is conceded, in respect of the two quarters ending in June and in September, 1888, that when he died no part of the \$8 then due had been actually paid to the society; and the question is: had he done that which was the legal equivalent of payment, or was he "clear in the books?" He had done this: the two quarters having elapsed without payment by the deceased, notices to pay those dues were sent to him by the secretary of the society. October 14th, a son of the deceased, on his behalf, sent a check for \$8, the amount of the dues for two quarters, to the secretary of the society. Next day the secretary returned the check, with a letter stating that he had no authority to accept dues from members, which must be paid at meetings of the society or at meetings of the directors, and that the next meeting would be held in the ensuing November. The secretary admitted that he was in the habit of receiving dues from members, but this he did as a favor and not under the authority of the by-laws. It appeared that this son of the deceased made other tenders in cash to the secretary, which, however, he declined to receive on the same ground. The deceased died October 25th, 1890. At his death was he "clear in the books?" The secretary had no authority, under the constitution or by-laws, to receive dues from members. As member of the society the deceased was chargeable with notice of the by-laws; when he attempted, by his agent, to pay his dues, he did so by tender to a person without actual authority to accept it; and so, it is said, he died in default to the society. But it is answered that the society is estopped to deny the authority of the secretary, by his habitual practice in receiving dues from members. That such was his practice is incontrovertible upon the evidence. A practice so habitual and so long continued, aided by the fact that the dues received by the secretary were paid by him to the society, raises a presumption, if not that the by-law requiring

Boeding v. Sons of Moses.

the treasurer to receive all moneys had been tacitly abrogated, at least that such practice of the secretary was known and ratified by the society. This presumption is not rebutted by a particle of proof; and so the defendant was estopped by the apparent authority which it communicated to its agents. The distinction which the secretary draws between his official and his individual character, saying that he received dues in the latter and not in the former capacity, is one which, existing only in his own consciousness, could not be perceived by those who put the money in his hands. To suffer its secretary habitually to receive and pay to it dues from members, without objection that he had no authority so to do, and then, when by the death of a member the error is irreparable, to deprive the widow of her pittance on the pretext that the tender was to the wrong person, is an injustice which the courts will be astute to avert. The argument of defendant's counsel, that the secretary apprised the deceased of his lack of authority to receive dues, is without force; since he did so on the 15th of October, the day after the tender.

Appellant urges that the tender of payment was not made at "the legally specified time," as prescribed by the by-laws; but the answer is obvious, that this time is too uncertain and indeterminate to justify a forfeiture for failure to ascertain it.

For near forty years, the deceased had been contributing to the treasury of the society, and it would be the extreme of injustice to deny his widow the small provision, because \$8 were not tendered on the very day of payment.

The deceased was "clear in the books;" but, if not, it was the fault of defendant.

J. F. DALY, Ch. J., and BISCHOFF, J., concurred.

Judgment affirmed, with costs.

Shook v. Lyon.

SHERIDAN SHOOK *et al.*, Respondents, *against* JAMES D. LYON, Appellant.

(Decided December 1st, 1890.)

Defendant was employed by plaintiffs as book-keeper and cashier, it being his duty to receive payment of money and turn it over to them and enter the receipt thereof in their books. In an action by them against him for the amount of such a payment received by him and alleged not to have been paid over, he admitted that he had received the money, and that no entry thereof had been made in their books. *Held*, that this was sufficient, even as against the presumption of his innocence, to cast on him the burden of proving that the money actually came to the possession or custody of plaintiffs.

Plaintiffs had brought another action against defendant for conversion of a part of another sum of money which they alleged he had previously received for them, but had entered in their books and accounted for part only thereof. *Held*, that the pendency of such other action was not a bar to their action to recover the other payment subsequently received by him, as money had and received to their use; as the receipt of and failure to account for each sum constituted a separate cause of action, although both demands arose out of his employment.

APPEAL from a judgment of the District Court in the City of New York for the Sixth Judicial District.

The facts are stated in the opinion.

George W. Werffenbach, for appellant.

David M. Neuberger, for respondents.

BISCHOFF, J.—The plaintiffs were brewers engaged in business under the firm name of Shook & Everard, and the defendant was employed by them as bookkeeper and cashier for a period exceeding ten years. In the course of his employment it was the duty of the defendant to receive payment of money from customers and to account therefor to the plaintiffs, by turning over the money received, entering the receipt thereof in the cash book kept for that purpose, and

Shook v. Lyon.

crediting the customer's account with the sum paid. After the defendant had left the plaintiffs' employ they discovered that one John H. Enhuss, a customer, held two receipts of the defendant purporting to be for money paid by Enhuss to the defendant on account of his indebtedness to the plaintiffs. These payments were made on separate and distinct occasions: one being for the sum of one hundred and fifty dollars, for which, upon a corresponding date, the defendant had entered upon the plaintiffs' books, the receipt of only one hundred and twenty-five dollars; the other was for seventy-five dollars, for which no entry whatever had been made. Plaintiffs brought two actions in the Sixth Judicial District Court, one being for the conversion of twenty-five dollars, the amount remaining uncredited on the one hundred and fifty dollar payment, and the other being for seventy-five dollars, money had and received to the use of the plaintiffs. The summonses in both these actions were served at the same time, and trial therein had on the same day. The trial in the suit for conversion immediately preceded the trial in the suit for money had and received, the decision in the former being reserved, at the time of the trial of the latter, which is the action wherein the judgment appealed from was rendered. To the claim of the plaintiff in the last-mentioned action the defendant had interposed the defense of "another action pending."

It appeared on the trial that it was the duty of the defendant as plaintiffs' cashier and bookkeeper to receive monies from customers, to give receipts therefor, and to enter the sums paid in a cash book provided for such purpose, and to credit the customer paying the same therewith. It was admitted by the defendant that he had received the seventy-five dollars from Enhuss, and that no entry of this sum had been made by him in plaintiffs' books.

But, it was urged on behalf of the defendant, that the mere omission to make such entry was not, in itself, sufficient proof, that he had not accounted to the plaintiffs for the money received; and that to authorize a recovery against the defendant, the plaintiffs were bound to establish by other positive

Shook v. Lyon.

and direct evidence the defendant's failure to account to them for monies received.

To establish the defense of another action pending, the defendant offered in evidence the record of the action for conversion of twenty-five dollars ; from which record it appeared that the sum alleged to have been converted was no part of the sum sued for in this action, but was part of a payment made by Enhuss upon a former separate and distinct occasion. The justice in the district court thereupon rendered a judgment in favor of plaintiffs for ninety-two dollars and fifty cents, the amount sued for, with seventeen dollars and fifty cents costs and disbursements, and from this judgment the defendant has appealed.

On the argument of this appeal counsel for defendant claimed that the judgment was erroneous, and assigned two distinct grounds of error, to wit: first, that because of the want of direct and positive evidence to the effect that the defendant had omitted to turn over the money received, the plaintiffs' recovery was unauthorized ; and, second, that the plaintiffs had exhausted their right of recovery against the defendant by the action for the conversion of the twenty-five dollars, because both demands arose out of the defendant's employment, and the pendency of the suit for the conversion of twenty-five dollars operated as a complete bar to the maintenance of this action.

Upon an examination, however, of the questions presented, we are satisfied that neither ground is tenable.

The difference between circumstantial and direct evidence is only one of degree, but both classes of evidence are alike applicable to all cases.

The admitted receipt of the sum paid by the plaintiffs' customer, in view of the facts that it was the defendant's duty to enter the receipt of these monies upon the plaintiffs' books in the regular course of his employment, that it was his duty to account to the plaintiffs for the monies received, and that he omitted to make such entry and such account if this is not to be deemed sufficient to cast upon the defendant the burden of proving that, notwithstanding such omis-

Shook v. Lyon.

sions, the monies were otherwise actually accounted for, and if, in the absence of such proof, plaintiffs should not be allowed to recover, it would be difficult to conceive of any case wherein recovery could be had upon circumstantial evidence alone.

Upon the argument defendant's counsel urged, that the presumption of innocence, when the gist of the action is to convict the defendant of a wrong, applies with equal force in civil actions; and that therefore no presumption can arise that the defendant did not account to the plaintiffs for money received, from the mere omission to make the entries on the books of the plaintiffs. The position assumed by defendant's counsel is incorrect. The true rule applicable to all civil actions is, that the party having the affirmative must prove his case by a preponderance of evidence to sustain a recovery, always giving the defendant the benefit of the presumption of innocence (See *Seyboldt v. New York, etc., R. Co.*, 95 N.Y. 562; *Johnson v. Agricultural Ins. Co.*, 25 Hun 251; 3 Greenleaf on Evidence § 29). And, in an action to recover a penalty for a violation of the statute forbidding the sale of imitation butter, although the act complained of is made a misdemeanor by the statute and punishable as such, the plaintiff is not obliged to establish his case beyond a reasonable doubt; but it is sufficient if there be a preponderance of evidence in his favor (*People v. Briggs*, 114 N. Y. 56).

In support of his contention, counsel for appellant cites the case of the *New York & Brooklyn Ferry Co. v. Moore* (32 Hun 29); this case was reversed by the Court of Appeals (See 102 N.Y. 667). The report of the disposition of this case by the Court of Appeals, however, in the New York reports, does not contain the opinion. But in the report of the same case in 18 Abbott's New Cases, 114, Judge EARL, writing the prevailing opinion, says; "There is no rule of law which requires the plaintiff in a civil action, when the judgment against the defendant may establish his guilt of a crime, to prove his case with the same certainty which is required in criminal prosecutions. Nothing more is required in such cases than a just preponderance of evidence, always giving the defendant the

Shook v. Lyon.

benefit of the presumption of innocence. Where a judgment for the plaintiff involves crime or a moral turpitude on the part of the defendant, the court should always require satisfactory proof; and when that has been given, judgment should follow, regardless of consequences. In no other way can the law be properly administered and private rights effectually protected."

But, assuming for the sake of argument that the contention of defendant's attorney is correct, the presumption of innocence is at most a disputable presumption of law, arbitrarily created, but to be overcome by the inferences which reasonable and fair-minded men may draw from the facts; as, for instance, the possession of stolen property recently after the larceny; in such a case it has been held that the possession of the stolen property, if unexplained, is sufficient to overcome the presumption of innocence and to warrant a conviction (*Stover v. People*, 56 N.Y. 315).

The case at bar was tried before the justice in the court below without a jury, and it was therefore competent for him on the evidence to determine both the law and the facts, which he has done adversely to the defendant. It was admittedly the duty of the defendant in the regular course of his employment to account to the plaintiffs for monies received to their use, by entering the monies so received upon their books, and his omission to make such entries will support an inference that he has not so accounted. The inference may be slender, but it is sufficient to call upon the defendant for proof that, notwithstanding the omission to make the entry and his breach of duty in that respect, the monies received by him did actually come into the possession or the custody of the plaintiffs. An attempt was made by the defendant to supply this proof, and to that end testimony was given for the defendant to the effect that the omission to make the entry of receipt on the books of the plaintiffs may have been accidental and without design; that notwithstanding such omission defendant may have accounted to the plaintiff for the money received. But it is apparent that this is only a possible explanation of the defendant's delinquency, and does not tend

Shook v. Lyon.

to show that an accidental omission to make the entry in this case is the true solution of the defendant's apparent neglect to account to the plaintiffs for the monies received by him. The trial justice, in reaching the conclusion which he did, may have been influenced by the manner and appearance of the defendant on the witness stand, and, inasmuch as the evidence will support an inference adverse to the defendant, an appellate court should not, for the sole reason that upon the same state of facts it might have reached a different conclusion, interfere with the findings of the court below (*Baird v. Mayor*, 96 N. Y. 567).

The pendency of the action for the conversion of twenty-five dollars was not a bar to the maintenance of this action. We recognize the force of the rulings in *Bendernagle v. Cocks* (19 Wend. 206); *Jex v. Jacob* (19 Hun 105); *Secor v. Sturgis* (16 N. Y. 548); *Perry v. Dickerson* (85 N. Y. 345), and kindred cases; but these rulings have no application in the case at bar.

The rule, as stated in the head note in *Bendernagle v. Cocks*, is as follows: "Where a party hath several demands or existing causes of action growing out of the same contract, or resting in matter of account, which may be joined and sued for in the same action, they must be joined; and if the demands or causes of action be split up, and a suit brought for part only, and subsequently a second suit for the residue, the first action may be pleaded in abatement or in bar" of the second action.

The error into which the learned counsel for the defendant has fallen seems to be that the plaintiffs' right of action for the monies received by the defendant rested in the contract of employment of the defendant, as the plaintiffs' bookkeeper and cashier. The right of action, however, respecting such monies was complete without proof of such employment. Leaving that element entirely out of the case, it would have been sufficient to authorize a recovery by the plaintiff, to show that the defendant had received the sums unaccounted for, for the purpose of paying the same to the plaintiffs, and for the conversion of these monies the defendant was answer-

Shook v. Lyon.

able in damages (See *Gordon v. Hostetter*, 37 N. Y. p. 99).

The right of action, however, where the property or money alleged to have been converted came lawfully into the possession of the person sought to be charged, as in the case at bar, was not complete without a previous demand (1 Addison on Torts, 398; *Storm v. Livingston*, 6 Johns. 44).

And without proof of such demand and of a refusal to deliver, a conversion is not proven. And where the person from whom a recovery is sought for an alleged conversion is charged with the receipt of several items of money or personal property on separate and distinct occasions, proof of the demand of one of such items only will not sustain a recovery for the items respecting which no demand has been shown. The right of action in such cases accrues only from the time of the demand, and hence it must follow that the right to recover for the several items constitutes separate and distinct causes of action. This is elementary; but if an authority is needed to support this view, it may be found in the case of *Secor v. Sturgis* (16 N. Y. 548), relied upon by defendant's counsel, wherein Judge STRONG says: "In the case of torts each trespass or conversion or fraud gives a right of action, and but a single one, however numerous the items of wrong or damage may be."

The action for money had and received proceeds upon the theory of a promise, express or implied, that the person receiving the money will pay the same to the person seeking to recover (See *Eddy v. Smith*, 13 Wend. 469; *Garr v. Martin*, 20 N. Y. 306). And thus the several payments, made by one person to another on separate and distinct occasions, to be paid to a third person, constitute as many separate and distinct promises to pay as there are payments, and each promise must necessarily confer upon the person entitled to the monies received a separate and distinct cause of action. It was no more essential to the plaintiffs' right of recovery in an action for money had and received, than it would have been in an action for conversion, to prove the defendant's employment as bookkeeper and cashier of the plaintiffs. If he had been a complete stranger to the plaintiffs, the fact that

Smith v. Dittman.

he had received a sum of money from another to be paid by him to the plaintiffs, in law created a promise so to pay, and was sufficient to entitle the plaintiffs to judgment. And having separate causes of action existing at one and the same time, they were not required to combine them in one action (*Perry v. Dickerson*, 85 N. Y. 350). And though the plaintiffs had knowledge of the existence of these several demands at the time of bringing an action upon one of them, a recovery in that action will not defeat a recovery in actions subsequently commenced upon the remaining demands (*Byrne v. Byrne*, 102 N. Y. 4).

The foregoing views do not trespass upon any legal principle, and appear to be in consonance with justice.

A different conclusion would enable a dishonest employe to reap advantage from the temporary successful concealment of continued defalcations, by suffering a recovery against him for the items of his defalcations which may be known to the employer at the time of bringing his action, and which may constitute but a small fraction of the entire sum misappropriated.

The judgment appealed from should be affirmed, with costs.

J. F. DALY, Ch. J., and PRYOR, J. concurred.

Judgment affirmed, with costs.

ISABELLE SMITH, Appellant, *against* SEMON DITTMAN *et al.*,
Respondents.

(Decided December 1st, 1890.)

In an action for personal injuries to plaintiff, a woman, from being struck on the head by a bale of cloth, by reason of negligence on the part of defendants, the evidence was that the blow had caused great pain and marked prostration, continuing to the time of the trial, more than three years after the injury, so that during that time plaintiff had suffered incessant and excruciating pain, and had been unable to rise from a recumbent position, and was not able to sit up, and had lost much flesh and become very weak; that her injuries were permanent, and it was

Smith v. Dittman.

reasonably certain that her condition would not improve; that, at the time of the injury, she was 20 years of age and in good health; that her expenses on account of the injury amounted to about \$8,000, and her loss of earnings to \$4 a week. The jury found a verdict for plaintiff for \$1,000.

Held, that it should be set aside as inadequate.

In such an action, exclamations of pain by plaintiff, immediately after the injury, are admissible in evidence.

The entry of judgment by a plaintiff on a verdict in his favor, in order to appeal therefrom, is not such an adoption of the verdict as to estop the plaintiff from objecting to it for inadequacy of the damages.

APPEAL from a judgment of this court entered on the verdict of a jury and from an order denying a motion for a new trial.

The action was brought for personal injuries to plaintiff alleged to have been caused by the negligence of defendants. The jury found a verdict for plaintiff for \$1,000. Plaintiff made a motion for a new trial for inadequacy of damages and on other grounds, which was denied. Plaintiff thereupon entered judgment on the verdict and appealed from the judgment and from the order denying her motion for a new trial.

D. M. Porter, for appellant.

Austen G. Fox, for respondents.

PRYOR, J.—The appeal is by plaintiff from a judgment on a verdict in her favor, and from an order denying a motion for a new trial. The motion was made on the minutes, and “upon the ground that the verdict is for insufficient damages, and because the verdict is contrary to the law and to the evidence.”

I am of opinion that the verdict under review involves a miscarriage of justice which it is the duty of the court to correct.

The action is for an injury to the person of the plaintiff, inflicted by the negligence of the defendants. The verdict in plaintiff's favor is conclusive of the liability of the defendants, and, being for \$1,000, evinces the judgment of the

Smith v. Dittman.

jury that the plaintiff was entitled to more than nominal damages.

The injury occurred on the 15th of January, 1887, and was caused by the fall of a bale of cloth, which hit plaintiff on the head. The blow struck her senseless, and she continued unconscious for some time. She recovered, however, sufficiently to walk, with the support of a friend; and within an hour or two she returned to her home. That night she sent for a doctor. He was a physician in active practice and of nearly forty years' professional experience. He had known the plaintiff from her infancy. He testified, not as an expert upon a supposititious state of facts, but as an actual observer of real facts within the cognizance of his own senses. Responding to the call, the doctor found the plaintiff "pallid, excited, supporting her head with her hand." "She was in a state of marked prostration, and complained constantly. She complained of pain in her head, more especially the back part and top of her head; and that has been a frequent symptom, with pain in the front of the head, almost a constant symptom from that time" (15th of January, 1887), "to the present" (18th of June, 1890); on the 11th of February, 1887, "I examined her very carefully, and saw at that length of time the symptoms as I have described them. I found her at that time (11th of February) pallid and already somewhat wasted. She was unable to rise from her recumbent position, and by great effort she could raise her head about one inch from the pillow; she lies in a dozing state a considerable part of the time, and her eyes are partly open—the eyelids are partly open. When she was aroused she complained, not only of pain in her head, but also in her chest, which I regarded as neuralgic pain; and in the abdomen—pain in her bowels; and at times she had pain in her feet. She has occasional sighing respiration; this a physician understands to be a very important symptom, as indicating an affection of the brain. Her mind was wandering; when I asked her how much one from five left, she said two; and that two and five made one hundred and fifteen; her mind is wandering; she addresses people in the room that are not

Smith v. Dittman.

there; thought she saw people in the room that were not there. These symptoms continued for some days." On February 15th she exhibited "continued wasting and emaciation, and loss of power in her muscles, inability to use the muscles as in a state of health. February 14th, she couldn't rise up on her elbow from a reclining position; still had persistent headache from back part of the head to the forehead; complained also of pain in the spine and left leg. The nerves from the hinder part of the brain extending down here produced this neuralgic pain in her limbs; and I would say, as a symptom I noticed then, which seemed to me quite important, and that is, that the pulse was only fifty-four—sub-normal pulse—the ordinary pulse being seventy-six to seventy-eight. Her pulse was fifty-four, showing some pressure upon the brain, the pneumogastric nerve."

On the 4th, 19th, 25th, and 28th of March, her symptoms were "a sensation as if the skin were drawn tightly over the head, constant pain in the forehead and back of the head, although ice-bags were constantly applied; the pain extends along the spine and legs; she has pain in the epigastrium, and nausea; her appetite had greatly failed, and she could only take a small amount of food in a liquid state; her catamenia, or monthly period, had ceased—it shows a greatly impaired health when that function ceases; she trembles violently when I ask her to extend her leg; she is reclining, with the leg trembling like that with weakness; she has been constantly in the reclining position as you see her (at the trial), except as she is supported in an upright position, and if at any time she has attempted to walk, she found it necessary to be supported."

On the 13th of April, 1890,—three years after the hurt—plaintiff was again examined by the witness, and he found that "she has still this headache, frontal and occipital, daily; she cannot read even a coarse, ordinary print, without an increase of the headache; if she attempts to amuse herself in that way, she is obliged to desist; noise and excitement have the same effect; she lost considerable flesh since the injury, probably 30 or 40 pounds; cannot walk, cannot sit

Smith v. Dittman.

erect, cannot rise in bed even upon the elbow, cannot raise the weight of eight pounds—I tested her two or three times; her appetite is moderate—takes two or three meals a day; the bowels are habitually constipated.”

The physician further testified that plaintiff's injury is permanent; “that it is reasonably certain that time will not improve her.” No expert was produced to challenge the prognosis of the witness, and to give a more hopeful augury of the event, although plaintiff was attended by a number of the leading physicians of the city. As to her suffering, plaintiff testified that she suffered “very much;” that she “suffered excruciating pain for a long time;” that she “suffered all over;” that she “is not now able to sit up.” At the time of her hurt, plaintiff was 20 years old, and was “a healthy young woman,” a fact apparent from the photograph in evidence.

Finally, the fact is uncontradicted, that plaintiff's expenses on account of her injury amount to about \$3,000; and her loss of earnings to \$4 a week for three years.

Such, in summary, was the evidence, and the uncontradicted evidence too, of plaintiff's damages from defendants' wrong; and yet the jury allowed her but \$1,000!

It appears that plaintiff was dependent upon her own labor for a livelihood; and of the ability to earn that livelihood, defendants have totally and permanently deprived her. For three years her sufferings have been incessant and excruciating; and the “reasonable certainty” is that they will distress her through life. In the vain quest for some cure or alleviation of her agonies, she has already expended three times the amount of money which the jury awarded her in compensation for all the consequences of her injury. In the bloom of early maidenhood she is prostrated by a blow which shatters her body and mind; which bereaves her of all the joy and pride of life; which denies to her the felicities of the marriage relation; which dooms her, till death shall happily release her, to a bed of helpless anguish; and for this the jury thought a thousand dollars an adequate indemnity!

In my judgment the verdict is shocking to reason and to

Smith v. Dittman.

the sense of justice; and is unaccountable except on an hypothesis which the law recognizes as a sufficient ground to set it aside.

In *McDonald v. Walter* (40 N. Y. 551, 554), the rule is thus propounded by the Court of Appeals: "A verdict for a grossly inadequate amount stands upon no higher ground, in legal principle, nor in the rules of law or justice, than a verdict for an excessive or extravagant amount. It is doubtless true, that instances of the former occur less frequently, because it is less frequently possible to make it clearly appear that the jury have grossly erred. But, when the case does plainly show such a result, justice as plainly forbids that the plaintiff should be denied what is his due, as that the defendant should pay what he ought not to be charged."

Again, in *Platz v. City of Cohoes* (8 Abb. N. C. 392), an action for personal injury, the Supreme Court hold, that a verdict may be set aside for inadequate damages, and on pages 396, 397, the learned judge says: "I cannot avoid the conviction that great injustice has been done the plaintiff by the verdict. I cannot conscientiously permit this verdict to stand. It is no compensation whatever, for the serious injuries the plaintiff has sustained" (*Richards v. Sandford*, 2 E. D. Smith 349; *Collins v. R. R. Co.*, 12 Barb. 492).

I am of opinion, furthermore, that plaintiff is entitled to a new trial for error of the court in the exclusion of evidence.

Plaintiff's counsel propounded this question to a witness: "What exclamation of pain, if any, did she make?" (This was on the return of plaintiff to her home immediately after the injury). Upon objection by defendants' counsel, the offered testimony was excluded, to which ruling plaintiff's counsel duly excepted.

Again, the question "Has she made any exclamation of pain?" was excluded, to which also, plaintiff's counsel excepted.

The authority cited by defendants to support the ruling is distinctly and decisively against it (*Roche v. R. R. Co.*, 105 N. Y. 294, 298; *Hazenlacher v. R. R. Co.*, 99 N. Y. 136). A story by a plaintiff on the witness stand of the pain he has

Smith v. Dittman.

suffered may be suspected as a prepared statement by an interested party to sustain his case ; but of a different character and of far greater probative force, are the involuntary cries of nature wrung from the sufferer by the poignancy of present anguish. The offered evidence bore directly on the question of damages ; and the court cannot say that its exclusion did not diminish the amount of the verdict.

In disposing of the case, it is not an immaterial consideration that, should a new trial be denied, plaintiff will be remediless—the Court of Appeals having no jurisdiction to review the decision of the question by this court—while, on the other hand, if a new trial be granted, defendants will have still another chance before the jury.

The question suggested by the ingenious counsel for defendants that plaintiff is estopped, by adoption of the verdict, from challenging its validity, might be worthy of consideration, if the facts he recites were before us. But, upon the record, it only appears that plaintiff's counsel entered judgment—a step necessary to perfect an appeal from it ; that he did appeal from it ; and that he promptly impugned the verdict for inadequacy of damages and repugnancy to the law and the evidence.

It is unnecessary to discuss the propositions that a party may appeal from an unsatisfactory judgment in his own favor, and may concurrently attack the judgment for error of law by the court, and the verdict for error of fact by the jury.

The judgment should be reversed and a new trial awarded, costs to abide the event (*Robbins v. R. R. Co.*, 7 Bosw. 1.)

J. F. DALY, Ch. J., and BISCHOFF, J., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

Seldman v. Gelb.

HERMAN SEIDMAN, Plaintiff, *against* AGNES GEIB *et al.*,
Defendants.

[SPECIAL TERM.]

(Decided December 3d, 1890.)

The answer in an action to foreclose a purchase money mortgage did not deny the allegations of the complaint, but alleged that plaintiff's conveyance of the premises to defendant was by a full covenant warranty deed, and that there was outstanding a paramount title to part of the premises; but it admitted that defendant had entered into possession; and there was no claim that she had been evicted or disturbed, or that plaintiff was not wholly solvent. *Held*, that the answer should be stricken out as frivolous; the question of title could not be tried in such an action.

Allegations of fraud made in a pleading on information and belief, without a statement of facts on which such belief is founded, are insufficient.

MOTION to strike out an answer as frivolous.

The facts are stated in the opinion.

George Haas, for the motion.

D. K. Schuster, opposed.

BOOKSTAVEN, J.—The motion is to strike out an answer as frivolous, and for judgment. An action is brought to foreclose a purchase money mortgage. The answer in question admits the making of the mortgage, and default in paying the instalments due. None of the material allegations of the complaint are denied, unless it be the execution of the bond, which must be through inadvertence; but this is cured, because, in setting up the affirmative defense in the answer, the execution of the bond is expressly averred. The defendant alleges as a defense that plaintiff conveyed the premises to her by a full covenant warranty deed, and avers facts to show that the deed did not convey the fee of the whole prem-

Seldman v. Gelb.

ises, but that there was a paramount title to one-fourth of it in one Annie Metzger at the time of the conveyance. She admits that she has entered into the possession of the premises, and there is no claim that she has not continued to be and is not now in undisturbed possession of them. She has neither been evicted nor disturbed in her possession, nor has any adverse action been commenced, as far as appears from the pleadings. No one has asserted or claimed a paramount title or a right to the possession, nor is it maintained that the plaintiff is not wholly solvent.

In *Abbott v. Allen* (2 Johns. Ch. 519), Allen, with his son, gave a deed in fee, with covenants for seisin in fee, with right to convey, for quiet enjoyment, and against incumbrances, and with a general warranty. A purchase money mortgage was given for a part of the consideration. Believing title to have failed, Abbott filed a bill, in which he set forth the facts, and alleged the defect of the title, and prayed that the defendant should perfect the title, or pay the plaintiff the deficiency, and be enjoined in the meantime from all proceedings on the bond and mortgage, and an *ex parte* injunction was granted, and the defendant moved to dissolve it on the facts, and that motion prevailed; the chancellor saying: "This case comes within the general doctrine declared in *Bumpus v. Platner*, that a purchaser of land who is in possession cannot have relief here against his contract to pay on the mere ground of defect of title, without a previous eviction. . . . It would lead to the greatest inconvenience, and perhaps abuse, if a purchaser in the actual enjoyment of land, and when no third person asserts or takes any measures to assert a hostile claim, can be permitted, on suggestion of a defect or failure of title, and on the principle of *quia timet*, to stop the payment of the purchase money, and all proceedings at law to recover it. Can this court proceed to try the validity of the outstanding claim in the absence of the party in whom it is supposed to reside, or must he be brought into court against his will to assert or renounce a title which he never asserted, and perhaps never thought of?"

If such a state of facts was insufficient to maintain an

Seldman v. Gelb.

action where it was possible to bring in a party supposed to have the adverse claim or title, it certainly is not good as a defense where the right of the third party must be determined without the possibility of bringing him into the action; and this doctrine has been subsequently affirmed (*Leggett v. McCarty*, 3 Edw. Ch. 124; *Banks v. Walker*, 2 Sandf. Ch. 344; *Miller v. Avery*, 2 Barb. Ch. 582; *Edwards v. Bodine*, 26 Wend. 109; *Griffith v. Kempshall*, Clarke Ch. 571; *Platt v. Gilchrist*, 3 Sandf. 118; *Farnham v. Hotchkiss*, * 41 N. Y. 9; *Parkinson v. Jacobson*, 13 Hun 317, affirmed *sub nom. Parkinson v. Sherman*, 74 N. Y. 88).

An action was brought in the Supreme Court by the defendant herein against the plaintiff herein to compel the defendant in that action (being the plaintiff in this action) to accept a reconveyance of the premises, and to repay the plaintiff the purchase price, and to cancel the purchase money mortgage, alleging the same facts in the complaint which are set forth in the answer herein as a defense. The action in this court for the foreclosure of the mortgage having been commenced afterwards, an order was asked for in the Supreme Court restraining the defendants in that action from proceeding with the action in this court to foreclose the mortgage, and the learned judge before whom the motion was made entertained the same view of law that I have above expressed, and denied the motion, which I think is a substantial adjudication of the question between the parties to this action, and would be conclusive for this motion but for the fact that, since such decision, and since the making and the arguments of the present motion, the defendant has served an amended answer, in which she attempts to change the whole character of the defense to one of fraud. The allegations in respect to such fraud clearly show that the facts on which the defendant founds it were fully within her knowledge at the time of commencing the action in the Supreme Court, and consequently she must have known of them when she interposed her original defense in this action; and I cannot avoid the conclusion that they were set up solely in consequence of the refusal of the Supreme Court to enjoin the prosecution of this action,

Carter v. Anderson.

and for the purpose of delay. Besides, all this is alleged upon information and belief, and no facts on which such a belief is founded are stated. Such allegations are insufficient (*Kay v. Whittaker*, 44 N. Y. 565). I think the answer is interposed for delay merely, and should be treated as a nullity (*Allen v. Compton*, 8 How. Pr. 251; *Vanderbilt v. Bleeker*, 4 Abb. Pr. 289).

I therefore think the motion should be granted, with costs.

Motion granted, with costs.

ELLEN CARTER, Respondent, *against* MARY ANDERSON *et al.*,
Appellants.

(Decided December 18th, 1890.)

Plaintiff, claiming title to a store under a bill of sale executed by a former owner thereof, since deceased, brought summary proceedings to recover possession of it, against the deceased owner's sister, who was deceased's next of kin, and against her son. It appeared that the mother had refused to send her son to open the store for plaintiff, and had said that any one who attempted to go into the store by force would be arrested; and that the son had been employed in the store by such former owner until his death, and thereafter, having no knowledge of plaintiff's title, had entered the premises by means of a key given him by deceased, in order to care for the property; and then, discovering that plaintiff had entered the premises, he had placed a padlock on the door to protect the property; and there was nothing more to show detainer by him, except a mere refusal to give plaintiff the key or to open the premises. *Held*, that as no violence or threats, tending directly to create a breach of the peace, were shown, there was no forcible entry or forcible detainer for which summary proceedings could be maintained under Code Civ. Pro. § 2233.

APPEAL from a final order of the District Court in the City of New York for the Seventh Judicial District.

The facts are stated in the opinion.

Roe & Macklin, for appellants.

William P. Burr and *Samuel Muller*, for respondent.

Carter v. Anderson.

BOOKSTAVEN, J.—The action was brought by the respondent for the forcible entry and detainer of the store in question by the appellants.

A forcible entry and detainer is a violent taking and keeping possession by one of any lands and tenements occupied by another, by means of threats, force, or arms, and without authority of law. It is essentially an action to protect the actual possession of real estate against unlawful and forcible invasion, to remove occasion for acts of violence in defending such possession, and to punish breaches of the peace committed in the entry upon or the detainer of real property (8 Am. & Eng. Encyc. of Law p. 102, and cases cited).

This remedy at common law is purely criminal in its nature, but under our statutes it has been made a civil remedy as well, the sole object of which is to regain a possession which has been invaded, and the only judgment which can be rendered in the civil action is that plaintiff has restitution of the premises of which he has been unlawfully deprived. The only questions to be tried are whether or not the plaintiff was lawfully or peaceably in possession of the premises sought to be recovered, and whether or not the defendant unlawfully entered or forcibly detained the same. Neither the right of entry or the right of possession is involved in the issue (*Carter v. Newbold*, 7 How Pr. 166; *Kelly v. Sheehy*, 60 How. Pr. 439; *Beller v. Cardwell*, 29 Mo. 72; *Beaucamp v. Morris*, 4 Bibb. [Ky.] 312).

In this case I do not think it is necessary to determine whether or not the plaintiff was ever lawfully possessed of the premises in question, as I think it clear from the evidence that neither of the defendants was guilty of either a forcible entry or a forcible detainer. As before stated, in order to constitute either a forcible entry or detainer, it is necessary that some violence or force should be used tending directly to create a breach of the peace (*People v. Fields*, 1 Lans. 222; *People v. Carter*, 29 Barb. 208). If none was used this proceeding cannot be sustained.

As far as Mrs. Anderson is concerned, there is no proof that she ever entered the store in question by force or other-

Carter v. Anderson.

wise, or authorized any other person on her behalf to do so. Neither did she do anything or cause anything to be done, which prevented the plaintiff from taking possession of the premises. The utmost that can be said of her is, that when asked to send her son to open the store for plaintiff she refused to do so; but a mere refusal to give possession unless put out by law does not constitute an unlawful detainer (*Johnson v. West*, 41 Ark. 535; *Hoffman v. Harrington*, 22 Mich. 52). The mere statement by her that any one who attempted to go into the store by force would be arrested does not amount to a threat tending to create a breach of the peace.

As far as William Anderson is concerned, it appears that he was a nephew of Patrick J. Kennedy, the former owner of the store, through whom the plaintiff claims title under a bill of sale; that he had been employed by Kennedy as a bar-keeper for more than a year prior to such bill of sale; that he had never been informed by him of the bill of sale or any transfer of the property, and that he was retained in his employment up to the day of his death; that he had a key to the store given to him by Kennedy, with the right to use the same, which had never been revoked; that the license for the place was in Anderson's name; and that Mrs. Anderson, his mother, was the next of kin of the deceased. The latter fact, however, I regard as of but little consequence. It is sufficient that he was in the employment of the apparent owner of the store at the time of the latter's death, to warrant him in continuing in possession and guarding his master's property until the true owner should appear and take possession. It would be intolerable to hold that a servant would be released from all responsibility or care of the master's goods immediately on his death, although the latter fact may dissolve the relation theretofore existing between master and servant. The entry which he made upon the premises was quietly done, without force or threats, by using the means of entrance which the master had given him, and apparently solely for the purpose of looking after the store and its contents, and feeding the cats that were on the premises; and this certainly could not constitute a forcible entry. When he discovered

Carter v. Anderson.

that the premises had been entered by the plaintiff, and after she had quietly left the same, he placed a padlock upon the door, in ignorance of the plaintiff's claim, and, as I judge from the evidence, solely for the purpose of protecting the property, which, under the circumstances of the case, I think it was his duty to do.

The testimony leaves it in grave doubt whether he was ever applied to by any one on behalf of the plaintiff to give her a key to the premises or to open the same for her. At most his acts in that respect amounted to a mere refusal, and as before shown this is not sufficient to sustain such an action.

The only force or threats that were used by any one to prevent the plaintiff from taking possession of the store or to keep her out of the same, were by the police in the interest of the public peace, and it is not shown that either of the defendants had any agency in inducing them to use this force or these threats.

The person in actual possession at the time of the trial was Mr. Thomas P. Wallace, who, after the commencement of the action, together with Mrs. Anderson, had been appointed administrator of the estate of Kennedy, and who had quietly and peaceably obtained such possession; but he was not made a party to this action.

The defendants first answered denying the forcible entry and detainer, and afterwards put in an amended answer which omitted to make such denial, and a motion was made for a final order on that account; but it was denied by the justice and the case was tried as if there had been such a denial; and upon the facts as before stated I think the justice erred in making the final order he did, and that the same should be reversed with costs of this appeal; but under the circumstances I do not see how we can award restitution.

ALLEN, J., concurred.

Final order reversed, with costs.

Barron v. Yost.

HUGH J. BARRON, Respondent, *against* FERNANDO YOST,
Appellant, *et al.*

(Decided January 5th, 1891.)

The facts that a contract was made by one of the parties to it under a name containing the designation “& Co.,” not representing an actual partner, and that such party carries on business under that name in violation of section 363 of the Penal Code, are not a defense to an action by such party on the contract, unless credit was given to him and reliance placed on such false designation.

APPEAL from an order of this court.

The action was brought by plaintiff Hugh J. Barron against Fernando Yost and another to foreclose a mechanic's lien. Defendant Yost moved at Special Term for leave to serve an amended answer, setting up that the contract for doing the work and furnishing the materials alleged in the complaint was made by the plaintiff under the name of “H. J. Barron & Co.,” which name was fictitious, in that there was no actual partner or partners represented by the designation “& Co.,” and that plaintiff was carrying on business under said fictitious name in violation of section 363 of the Penal Code. The motion was denied, and from the order entered thereon defendant Yost appealed.

Eugene K. Sackett, for appellant.

Frank M. Avery and *Edgar J. Phillips*, for respondent.

J. F. DALY, Ch. J.—In the case of *Lane v. Arnold* (11 Daly 293), following the current of decision in the courts of original jurisdiction in this state, we held that persons violating the statute of 1833 by doing business in the name of a party not a member of the firm, lost the right to recover for goods sold by them in that name, for although there was only a technical violation of the statute, a wrongful intent must

Barron v. Yost.

be inferred from the intentional doing of the wrongful act; but in view of the observation in *Wood v. Erie R. R. Co.* (72 N. Y. 198), that the object of the act of 1833 was "to prevent persons from obtaining credit on the strength of a name that has been withdrawn or which they have no authority to use," we allowed an appeal to the Court of Appeals (the case having come to us from the Marine Court, now the City Court), in order that the court of last resort "might apply the law in a more liberal spirit," we not feeling at liberty to place a construction upon the statute which would save persons violating the law, even innocently, from the consequences of their lapse from strict conformity to its provisions.

In a case decided shortly after, *Gay v. Siebold* (97 N. Y. 472), in the court of last resort, it was held that the statute was highly penal, should be strictly construed, and that a case is outside the statute, though within the letter, if not within the intention of the statute; that the purpose of the statute was to protect persons giving credit to the fictitious firm on the faith of the fictitious designation, and was not needed for the protection of those who obtained credit from such a firm; and although in that particular case it was found that the defendant knew who actually constituted the firm and consciously transacted the business with them in their true names, and it might well be said that the statute was not even in form violated, yet the court placed its decision on the ground that "no credit was given to and no reliance placed upon the false designation, and in fact no credit whatever was given to the plaintiff." It was also added that all the parties to the transaction knew who the real parties were and no person was deceived and there was no possibility that any of the parties could be imposed upon or harmed by the false designation.

This decision establishes the rule that it is not every case of transacting business under a fictitious name that is within the statute, but that to make the act illegal it must appear that credit was given to and reliance placed upon the false designation and that credit was given to the person or

Matter of Bryce.

persons using the false designation. In the case before us the proposed defense merely alleges the use of the fictitious name by the plaintiff in doing the work for the defendant and furnishing the materials and in making the contract therefor, and the carrying on of the business by plaintiff under the fictitious name, and that therefore, the contract entered into by defendant with him was illegal and void. These facts alone, if proved, would constitute no defense under the case quoted, and the motion to amend the answer by setting them up was properly denied.

The order appealed from should be affirmed, with costs.

BISCHOFF and PRYOR, JJ., concurred.

Order affirmed, with costs.

In the Matter of the General Assignment of CHARLES S. BRYCE to FRANCIS O. BOYD for Benefit of Creditors.

(Decided January 5th, 1891.)

Under the provisions of chapter 503 of Laws of 1887 that, in all general assignments for benefit of creditors, any preference (other than for wages, etc.), shall not be valid except to the amount of one-third in value of the assigned estate left after deducting such wages, etc., and costs, etc., and should said one-third of the assets be insufficient to pay in full the preferred claims to which they were applicable, then said assets shall be applied to the payment of the same *pro rata*, if different classes of preferences are created by an assignment, the whole of such one-third of the net assets may be applied to the first preferred claim, although insufficient to pay such claim in full; as the only limitation intended by the act is the restriction of the quantity of the debtor's estate which he may apply to claims preferred by him.

APPEAL from an order of this court.

Application for confirmation of the report of a referee on the accounting of Francis O. Boyd as assignee for benefit of creditors of Charles S. Bryce. The order made thereon,

Matter of Bryce.

confirming the report, directed the assignee to apply one-third of the net assets towards the payment of a claim of Ross & Kearney, which was the claim first preferred in the assignment. From that portion of the order, William A. Bryce, another preferred creditor, appealed.

William D. Veeder, for appellant.

John H. V. Arnold, for Ross & Kearney, respondents.

BISCHOFF, J.—The sole question to be determined on this appeal is as to the right of the court, under the provisions of the Laws of 1887, chapter 503, to direct the application of one-third of the net assets of the assigned estate towards the payment of the claim of the first preferred creditor, where the assignment creates several classes of preferences, and such one-third of the net assets is insufficient to pay the first preferred claim in full. The language of the statute referred to is as follows: “§ 30. In all general assignments of the estates of debtors for the benefit of creditors hereafter made, any preference created therein (other than for the wages or salaries of employes under chapter three hundred and twenty-eight of the laws of eighteen hundred and eighty-four and chapter two hundred and eighty-three of the laws of eighteen hundred and eighty-six) shall not be valid except to the amount of one-third in value of the assigned estate left after deducting such wages or salaries, and the costs and expenses of executing such trust; and should said one-third of the assets of the assignor or assignors be insufficient to pay in full the preferred claims to which, under the provisions of this section, the same are applicable, then said assets shall be applied to the payment of the same *pro rata* to the amount of each of said preferred claims.”

However much the practice of debtors in failing circumstances to give preference in payment to some creditors to the exclusion of others, by assignments for the benefit of creditors, may be condemned, the common law right to make such preferences has always been conceded to exist (*Riggs v. Murray*,

Matter of Bryce.

2 Johns. Ch. 565; *Grover v. Wakeman*, 11 Wend. 187; *Boardman v. Halliday*, 10 Paige 223; *Goodrich v. Downs*, 6 Hill 488; *Webb v. Dagget*, 2 Barb. 9; *Barney v. Griffen*, 2 N. Y. 365; *Nicholson v. Leavitt*, 6 N. Y. 510). And any statutory interference with such right must, therefore, be strictly construed (*Taylor v. Mayor, etc.*, 82 N. Y. 10).

Thus, in the consideration of the limitations upon the debtor's right to apply his property towards the payment of preferred claims, contained in chapter 503, Laws of 1887, only that which may be fairly deemed to have been the intendment of the legislature by the strictest interpretation of the statute should be held applicable; and all rights not abrogated in express terms, or by necessary implication, must, therefore, be regarded as still subsisting.

It is apparent from a careful and unbiased reading of the statutory provision above referred to, that the only limitation intended was to restrict the quantity of the debtor's estate which he may desire to apply in payment of the claims of creditors preferred by him, and that the common-law right of the debtor to create distinct classes of preferred creditors, and to provide that his assets shall be applied towards the payment of one class, in preference to an inferior class, is in no sense disturbed. That is to say, notwithstanding the statutory provisions above referred to, the debtor may still direct the application of one-third of the net assets towards the payment of the claim of one preferred creditor, before such assets shall be applicable to the payment of the claim of a second or third preferred creditor.

The language, "any preference shall not be valid, except to the amount of one-third in value of the assigned estate," is equivalent to saying that one-third of the assigned estate may be applied towards the payment of any preferred claim. The subsequent provision that, in the event that said one-third of the assets shall be insufficient to pay the preferred claims in full then said assets shall be applied to the payment of the preferred claims *pro rata*, has reference only to the case where such preferred claims belong to the same class, and are equally preferred in the order in which the one-third

Copley v. Hay.

of the net assets are directed to be applied, but does not contain any inhibition upon the debtor to direct the order or manner in which so much of his assets as may be properly applicable for that purpose shall be distributed among his preferred creditors.

The order appealed from should be affirmed, with costs.

J. F. DALY, Ch. J., and PRYOR, J., concurred.

Order affirmed, with costs.

GEORGE W. COPLEY *et al.*, Respondents, *against* AMELIA C. HAY, Appellant, *et al.*

(Decided January 5th, 1891.)

Under the provision of the mechanic's lien act of 1885 for the discharge of a mechanic's lien on the filing of a bond "conditioned for the payment of any judgment which may be rendered against the property" (Laws 1885, c. 342, § 24, subd. 6), it is not necessary, in an action on such a bond, that the owner of the premises should be made a defendant, and a judgment of foreclosure and sale rendered; a recovery may be had on the bond if the plaintiff shows himself entitled under the act to a lien which, but for the filing of the bond, would be enforced against the property.

In an action to foreclose a mechanic's lien, in which the owner of the property was made a defendant, the complaint set forth a good cause of action for such foreclosure, and also averred the filing by another defendant, one of the contractors for the building on which the lien was claimed, of "his bond for twice the amount of the plaintiffs' claim or lien herein." *Held*, that this did not show a discharge of the lien, under the provision above cited, which requires that the court shall fix or direct the amount of the bond and that the sureties shall be approved and an order made thereon by the court or judge discharging the lien; and that therefore a demurrer by the owner to the complaint, on the ground that it stated no cause of action as against her, was properly overruled.

APPEALS from an order of this court overruling a demurrer to a complaint and directing judgment thereon with costs, and from an order denying a motion to re-settle the judgment.

Copley v. Hay.

The facts are stated in the opinion.

William H. Arnoux and *Edward Marshall Grout*, for appellant.

William A. Crowe, for respondents.

J. F. DALY, Ch. J.—This is an action to foreclose a mechanic's lien filed on December 8th, 1888, against the defendant Amelia C. Hay, as owner, Mull & Fromer, contractors, and Bowers & Vreeland, sub-contractors, by the plaintiffs, who furnished materials to Bowers & Vreeland for the carpenter work upon the premises in question. The complaint alleges the facts necessary in an action to foreclose a mechanic's lien under the act of 1885 (Laws 1885, c. 342), and alleges in addition that on January 11th, 1889, the defendant Mull filed his bond for twice the amount of the plaintiffs' claim or lien herein in the clerk's office of the City and County of New York. Mrs. Hay, the owner, is made a party defendant, and it is demanded that it be adjudged that plaintiffs acquired, a valid lien upon the premises and have a lien on said bond and that defendants and all persons claiming under them be foreclosed, and the premises be sold, and the plaintiffs be paid the amount of their lien from the proceeds.

Mrs. Hay, the owner of the premises, demurs to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action against her. Her demurrer was overruled. She appeals, and both sides have argued the case as one presenting for decision the question whether, when a bond is filed to discharge a mechanic's lien, as provided by sub-division 6, section 24 of the act, an action of this character can be maintained and the owner of the premises made a party defendant, and judgment of foreclosure and sale be demanded and rendered. As this question may have to be ultimately decided in the case, it may be examined now.

The mechanics' lien act provides as follows:—"Section 24. A lien may be discharged as follows:— . . . 6. By the owner of the premises, person or persons, firm or firms,

Copley v. Hay.

corporation or corporations against whom or which the notice of lien is filed, executing with two or more sufficient sureties, who shall be freeholders, a bond to the clerk of the county where the premises are situated, in such sum as the court may direct, not less than the amount claimed in said notice, conditioned for the payment of any judgment which may be rendered against the property. The sureties on said bond must justify in at least double the sum named in said bond. A copy of said bond, with a notice that the sureties will justify before the court or a judge thereof, at the time and place therein named, not less than five days thereafter, must be served on the claimant or his attorney. Upon the approval of said bond by the court or a judge thereof, an order discharging such lien may be made by the court or a judge thereof." The respondents refer to the provision of the section and subdivision above cited declaring that the bond "shall be conditioned for the payment of any judgment which may be rendered against the property," and argue that, in order to obtain the right to enforce the bond, they must have a formal judgment of foreclosure against the property and consequently that the owner of the premises is a necessary party, such judgment being against her property.

There is undoubtedly an inconsistency between the absolute discharge of the lien, thus releasing the owner and the premises from it, and the maintenance of an action against such owner and the property. This inconsistency results, it is claimed, from the legislative enactment that, notwithstanding the lien is discharged, a judgment must be recovered against the property; and that the words of the act "conditioned for the payment of any judgment which *may* be rendered against the property," are equivalent to "conditioned for the payment of any judgment which *shall* be rendered against the property." It is possible, however, to construe the act so as to save the owner of the premises which have been discharged from a lien by the filing of a bond by a third party, from the expense and annoyance of a lawsuit, the only object of which is to enable the lienor to enforce such bond. This may be accomplished by regarding the statutory provision under con-

Copley v. Hay.

sideration as requiring, not that a judgment must be obtained against the property, but, that the lienor shall make out a case which but for the filing of the bond would have entitled him to a judgment against the property. If we read the provision as if it stood "conditioned for the payment of any judgment recovered by the lienor in an action in which judgment might have been rendered against the property if no bond had been filed," we shall not be unduly importing into the enactment anything contrary or additional to its provisions, but shall be reading it in the light of the evident intention of the legislature.

It cannot be presumed that the law-makers intended that after the property had been discharged from the lien an action against the owner could be maintained for the foreclosure and sale of the premises; and as suggested by respondents' counsel, the difficulty can be avoided by reading the word "may" in the clause in question in its natural meaning of "possible:" thus, "any judgment possible to be rendered:" amplified to "any judgment to which the property otherwise might have been liable." We must give the statute such a construction as will carry into effect all its parts. It is clearly the intention of the legislature that the lien shall be discharged upon the filing of the bond. It is equally clear that no recovery shall be had upon the bond unless the plaintiff shows that he had a valid lien upon the premises when the bond was filed; and if, therefore, we construe the provision in question as requiring that the plaintiff shall in his action upon the bond show himself entitled under the mechanics' lien act to a lien which but for the filing of the bond would be enforced against the property, we shall be satisfying all the requirements of the statute and imposing no greater obligation upon the sureties than that which they assumed.

In the present case, however, it does not appear that the proceedings necessary under the act to discharge the lien were taken. The averment in the complaint is "That on the 11th day of January, 1889, the said defendant DeWitt S. Mull, filed his bond for twice the amount of the plaintiffs' claim or lien herein in the clerk's office of the City and

Crager v. Reis.

County of New York." This is not sufficient to discharge the lien. The act requires that the court shall fix or direct the amount of the bond, that the sureties thereon must be approved after notice of justification, and that upon such approval an order discharging the lien may be made by the court or a judge thereof. Until such order is procured the lien is not discharged, and as the complaint does not allege the making of such an order it does not show that the property or the owner is relieved. For this reason the demurrer of Mrs. Hay is not well taken. The complaint as it stands sets forth a good cause of action for the foreclosure of the plaintiffs' lien, and as owner she is a necessary party defendant. The demurrer was, therefore, properly overruled, and the judgment should be affirmed. If the defendant alleges and proves a proper discharge of the lien by the filing of a bond under the act, then she may be entitled to judgment in her favor. Upon the pleading before us, she is not.

Judgment and order appealed from affirmed, with costs.

BISCHOFF and PRYOR, JJ., concurred.

Judgment and order affirmed, with costs.

LEWIS CRAGER, Respondent, *against* ROBERT REIS, Impleaded with MORRIS A. TYNBERG, Appellant.

(Decided January 5th, 1891.)

The presumption, in the absence of evidence as to the time of delivery of a release under seal, that it was delivered on the day of its date, is not overcome by the fact that the acknowledgment annexed to it was taken on a subsequent day, where it does not appear that the person who executed it had possession of it when he made such acknowledgment.

APPEAL from a judgment of the District Court in the City of New York for the Seventh Judicial District.

Cragger v. Reis.

The facts are stated in the opinion.

Sampter & Bloomfield, for appellant.

Hays & Greenbaum, for respondent.

BISCHOFF, J.—This was an action brought by the plaintiff against Robert Reis and M. A. Tynberg to recover the balance due for goods sold and delivered by the firm of M. Schlessinger & Co. to the defendants, comprising the firm of M. A. Tynberg & Co., the plaintiff claiming under an alleged assignment from M. Schlessinger & Co. The complaint alleged the copartnership of the defendants and the copartnership of Max Schlessinger and Emile Lux; that Schlessinger & Co. sold and delivered to Tynberg & Co. merchandise of the value of two hundred and twenty-one dollars and nine cents (\$221.09) of which one hundred and thirty-two dollars and sixty-four cents (\$132.64) had been paid, leaving a balance of eighty-eight dollars and forty-five cents (\$88.45) with interest. The complaint further alleged that, prior to the commencement of this action, Schlessinger & Co. had assigned the claim for the balance due, to the plaintiff. The defendant Reis by his answer did not controvert the allegations of copartnership, and he was, therefore, precluded upon the trial from offering any testimony in contradiction of the allegations in the complaint that the defendants were copartners under the firm name of M. A. Tynberg & Co., and that Max Schlessinger and Emile Lux were copartners under the firm name of M. Schlessinger & Co. The defendant Reis denied all other allegations of the complaint, and as a particular defense asserted that prior to the commencement of this action Schlessinger & Co., for valuable consideration, had forever released and discharged him from all liability upon the claim in suit. Upon the trial one Sigismund Tynberg, a son of the defendant Tynberg, was called as a witness for the plaintiff, and testified that he was the manager of the business of M. A. Tynberg & Co.; that he kept their books; that they had purchased merchandise from Schlessinger & Co. to the amount of two hun-

Orager v. Reis.

dred and twenty-one dollars and nine cents (\$221.09), of which only the sum of one hundred and thirty-two dollars and sixty-four cents (\$132.64) had been paid, and that there was due from said Tynberg & Co. to Schlessinger & Co., for the balance of the claim, the sum of eighty-eight dollars and forty-five cents (\$88.45), with the accrued interest thereon. No attempt was made on behalf of defendants to controvert this testimony, and the claim in suit was therefore sufficiently established. The plaintiff also produced in evidence an alleged assignment of the claim dated April 13th, 1889, signed M. Schlessinger & Co., which he attempted to prove by the testimony of Sigismund Tynberg, who testified that he saw the assignment executed by Emile Lux and delivered to the plaintiff on the day of its date. The defendant Reis, on the other hand, offered in evidence a paper under the hand and seal of Schlessinger & Co. dated September 12th, 1888, executed in the name of Schlessinger & Co. by Max Schlessinger, and purporting to release and discharge the defendant Reis from all claims which said Schlessinger & Co. had against him individually or as a member of the firm of M. A. Tynberg & Co. The execution of this release was proved by one Silberstein, the subscribing witness, who testified that he saw it executed by Max Schlessinger on the day of its date. He also testified that he saw it delivered, but whether or not delivery took place on the day it bears date or upon a subsequent day does not appear. We have, therefore, to consider in this case only the effect of the alleged assignment under which the plaintiff claims and the instrument under which the defendant claims to be released.

It is elementary that, in the absence of proof to the contrary, a deed in the possession of the grantee must be presumed to have been delivered on the day of its date (Best on Evidence § 402; Abbott's Trial Evidence, p. 508).

Applying this presumption to the facts of the case before us, and there being no proof of the actual time of its delivery, we are constrained to hold that the instrument discharging the defendant Reis from all liability to Schlessinger & Co. growing out of their claims against Tynberg & Co. was de-

Cragger v. Reis.

livered on September 12th, 1888, and, therefore, prior to the alleged assignment to the plaintiff, which is dated April 13th, 1889. And thus the plaintiff under the alleged assignment to him could not thereby have acquired any cause of action growing out of the indebtedness of Tynberg & Co. to Schlessinger as against the defendant Reis. If the plaintiff meant to contend that the release of Reis was actually delivered upon a day subsequent to its date, and subsequent to the assignment to him, it was incumbent upon him to introduce evidence to that effect, and in this he has utterly failed. The fact that the acknowledgment to the release was taken on a day subsequent to its date, and subsequent to the alleged assignment to the plaintiff, to wit, May 29th, 1889, is not sufficient to destroy the presumption of delivery on the day of the date of the instrument, since it does not appear from such acknowledgment that on the day of the date thereof Schlessinger was in possession of the instrument; and without some evidence that Schlessinger continued to be in possession of the instrument subsequent to the day of its date, we cannot find that it was delivered upon a day other than such day.

The judgment should be reversed, with costs to abide the event, and a new trial ordered.

BOOKSTAVEN, J., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

Cumber v. Schoenfeld.

JEREMIAH CUMBER, Respondent, *against* **LOUIS N. SCHOENFELD**, Appellant.

(Decided January 5th, 1891.)

A complaint, setting forth a cause of action for a malicious prosecution only, alleged that plaintiff was arrested therein under a warrant. At the trial it appeared, on cross-examination of defendant's witnesses, that the arrest was made without a warrant. *Held*, that granting leave to plaintiff to amend his complaint by adding a cause of action for false imprisonment, thereby introducing a new cause of action, was error, for which, though no exception thereto was taken, a judgment for plaintiff should be reversed.

APPEAL from a judgment of this court entered on the verdict of a jury and from an order denying a motion for a new trial.

The facts are stated in the opinion.

Christopher Fine, for appellant.

Jacob Fromme, for respondent.

PRYOR, J.—Appeal from a judgment for plaintiff on a verdict and from an order denying a motion for a new trial.

The complaint exhibits but a single cause of action, and that is strictly and exclusively for malicious prosecution. Plaintiff rested upon proof of a right of recovery for malicious prosecution only; but, having elicited on cross-examination of defendant's witness, that the arrest was without a warrant (although his complaint expressly alleged that the arrest was under a warrant), plaintiff moved, at the close of the case, to amend the complaint to conform to the proof. The motion was granted, and although no amendment was actually made, it is clear beyond controversy that the amendment moved for and allowed, was the addition to the complaint of a cause of action for false imprisonment. The amendment was so regarded by counsel and by the court; and, in the charge,

Cumber v. Schoenfeld.

the case was expressly submitted to the jury as authorizing a recovery as well for false imprisonment as for malicious prosecution.

Upon proper objection made at the time, the trial judge would undoubtedly have refused to permit the amendment. That it is improper to permit at the trial a new cause of action to be introduced into the complaint, is apparent upon the terms of the Code as well as by the uniform course of adjudication (Code Civ. Pro. § 723; *Price v. Brown*, 98 N. Y. 388, 393; *Reeder v. Sayre*, 70 N. Y. 181; *Harris v. Tumbridge*, 83 N. Y. 92, 97; *Bockes v. Lansing*, 74 N. Y. 437; *Baldwin v. Rood*, 1 N. Y. Supp. 713, 17 N. Y. St. Rep'r 517; *Buffalo, etc., Ferry Co. v. Allen*, 12 Civ. Pro. Rep. 64).

If it be answered that no exception was taken by defendant to the allowance of the amendment, the reply is, that, to authorise a review by the General Term, a formal exception is not indispensable (*Maier v. Homan*, 4 Daly 168; *Mandeville v. Marvin*, 30 Hun 282, 287, 289; *Standard Oil, etc., Co. v. Amazon Ins. Co.*, 79 N. Y. 506, 510; *Hamilton v. R. R. Co.*, 53 N. Y. 25, 27; *Lattimer v. Hill*, 8 Hun 171; *Ackart v. Lansing*, 6 Hun 476).

The case, then, was litigated throughout as an action for malicious prosecution and for nothing else; and it was not until both parties had rested and the summing up about to begin, that defendant intimated a claim to recover for false imprisonment. The fundamental condition of recovery in such an action, is proof by plaintiff of the absence of probable cause for his prosecution; and it is impossible to say what would have been the determination of the jury upon it had it been submitted to them as a separate and distinct question. Nay, as the case was, in fact, submitted to the jury, we cannot say but that they did not pass upon the question at all; for, in express terms, the court charged that "if the plaintiff shows that he has been illegally arrested or detained, that makes out his cause of action." With such an instruction, the verdict might well have proceeded upon the illegal arrest alone, although the jury had found for defendant on the issue of probable cause; and so the effect of interpolating a new

Eisler v. Union Transfer & S. Co.

cause of action, at the close of the case, becomes sufficiently manifest.

If it be said that no harm accrued to defendant by allowing a recovery for false imprisonment, because that ground of action was established by clear and incontrovertible proof, we answer that, at all events, the defendant should have had a fairer opportunity to contest the fact of the illegality of the arrest, than was afforded him by notice of an issue as to the fact given him for the first time after the close of the case.

We think, in the interests of justice, a new trial should be awarded, costs to abide the event.

J. F. DALY, Ch. J., and BISCHOFF, J., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

HENRY EISLER, Respondent, *against* THE UNION TRANSFER
& STORAGE COMPANY, Appellant.

(Decided January 5th, 1891.)

In an action to recover possession of goods claimed by plaintiff as mortgagee, brought against the mortgagor and a warehouseman having actual possession of the property, plaintiff's affidavit and complaint alleged that he was entitled to the immediate possession of the goods. The warehouseman answered denying plaintiff's allegations and setting up a lien for storage. *Held*, that the claim of lien was to be deemed controverted, and plaintiff might show, without a reply or any amendment of the pleadings, that the warehouseman had no debt or lien when the action was commenced or afterwards.

Where a mortgagor of chattels, after default in payment of the mortgage debt, making the mortgagee's title and right to immediate possession absolute, stores the goods with a warehouseman without the knowledge or assent of the mortgagee, the warehouseman has no lien on the goods as against the mortgagee.

Under sections 3060, 3067, and 3068, subdivision 3, costs must be awarded to the respondent upon affirming on appeal a judgment of a District Court of the City of New York; the provision of section 3213 gives discretion as to costs only where a judgment is modified or a new trial ordered.

APPEAL from a judgment of the District Court in the City of New York for the Seventh Judicial District.

Eisler v. Union Transfer & S. Co.

The facts are stated in the opinion.

Henry C. Andrews, for appellant.

Joseph Martin, for respondent.

BOOKSTAVEN, J.—This action was originally brought by the respondent to recover the possession of certain goods claimed by him as mortgagee. The defendants were the mortgagor and the Union Transfer and Storage Company, the latter of which was the only party served and appearing in the action. It was made a party defendant because it had the actual possession of the property at the time. The plaintiff's affidavit and complaint stated that he was entitled to the immediate possession of the property, and the defendant denied these allegations in his answer and set up a lien to the amount of \$17 for storage.

The action has been three times tried in the court below, and twice reversed on appeal to this court. On the second trial it appeared without contradiction that the mortgagor had before that trial paid to the company the full amount of its claim for storage, and that it had received the sum so paid in full satisfaction of its claim, and had surrendered to the mortgagor the other property stored with the goods in controversy. Consequently at the time of that trial there was no debt due for the storage of the goods, and it therefore had no right to hold the same, for there can be no lien where there is no debt; but appellant's counsel now contends that we ought not to regard these facts on this appeal, and claims that the former decision is *res adjudicata* as to those facts, for the reason that they were all before the General Term of this court which heard the appeal from the judgment rendered on the second trial in November, 1889, and also because they were improperly admitted in evidence.

We have carefully examined the record upon the former appeal and the decision of the November General Term, 1889, but cannot find that these facts were brought to the attention of the court on the argument of that appeal as required

Elsler v. Union Transfer & S. Co.

by Rule VII of this court, or that the General Term in reversing the judgment passed upon this question at all. It is probable from the persistency with which the counsel in this and the other warehouse cases have insisted they had a claim which was a lien upon mortgaged property, that it assumed there was some debt due the warehouseman, and the decision proceeded on that theory. We, therefore, do not feel concluded as to the question now raised.

As to the contention that these facts were improperly admitted in evidence, we do not think it is well founded. The affidavit in the claim and delivery proceedings expressly averred that the plaintiff was entitled to the immediate possession of the property. This was denied by the answer, which also set up the lien as before stated. It was not necessary for the plaintiff to reply to the new matter setting up the lien. Under the Code, the allegations in that respect were to be taken as controverted. It was, therefore, competent for the plaintiff to prove anything to show that he was entitled to the possession of the property at the time of the commencement of the action or at the time of the trial, and it was also competent for him to prove that the defendant had neither a debt nor a lien when the action was commenced or afterwards, and therefore no amendment of the pleadings was necessary to introduce this proof. Besides, the facts were brought out on the cross-examination of defendant's witnesses, and it was a legitimate subject of cross-examination. The facts appearing in the record, we have a right, and it is our duty to consider them upon this appeal, and if it were necessary we would even have the power to amend the pleadings to conform them to the proof in order to do substantial justice and sustain a proper judgment.

It cannot be in the interest of justice, when these facts appear upon the defendant's own testimony, that the complaint should be dismissed only in order to award the defendant costs, when he has no right whatever to the property, and when the plaintiff might commence a new action at once. Nevertheless, it is true, as contended by defendant's counsel, that in order to maintain an action for the claim and delivery

Eisler v. Union Transfer & S. Co.

of personal property it is necessary for the plaintiff to show that he was entitled to the possession of the property at the time the action was commenced (*Wood v. Orser*, 25 N. Y. 348; *Redman v. Hendricks*, 1 Sandf. 32; *Hudson v. Swan*, 83 N. Y. 552; *Duncan v. Brennan*, Id. 487; *Thompson v. St. Nicholas Bank*, 113 N. Y. 325).

It therefore remains to inquire whether the plaintiff was entitled to such possession at the time of the commencement of the action, and this depends upon whether or not the defendant had a lien upon the property at that time.

At a recent General Term of this court, in *Baumann v. Post*, (*ante*, p. 385), it was decided that where a mortgagor, after default in the mortgage, stored the mortgaged property with a warehouseman without the knowledge or assent of the mortgagee, the warehouseman acquired no lien upon the goods for storage as against the latter. But defendant's counsel contends that this case differs from that, in that here the mortgagee had knowledge of the storing and assented thereto. This was denied by the plaintiff, and whether or not he had such knowledge or gave such assent was a question of fact to be determined by the justice who tried the case. One of defendant's witnesses, the mortgagor, on the trial gave evidence tending to show that he had himself given notice to the plaintiff of his intention to store the goods, to which the plaintiff neither assented nor dissented, but, as the mortgagor testified, the plaintiff said in answer to such alleged information given to him, "Why didn't you store them with me and I would not have charged you anything," to which the mortgagor replied, "If I had known that I would have done so, but I have made arrangements with these people for \$3 a month and told them where they were."

From this testimony we gather that the property was either actually stored with the defendant at the time the notice was given, or that the arrangement had been completed between the mortgagor and the defendant for storing the goods; but this testimony, if it is to be believed, is denied by the plaintiff, and in it he is corroborated by the fact that he employed a detective to hunt up the property, and spent some

Elsler v. Union Transfer & S. Co.

time and money in doing so, which he would not have done had he known where the property was. The wife of the mortgagor in her testimony does not claim that she had any conversation with the plaintiff himself, but with a clerk or bookkeeper of his, and that the information of the intention to store was given to him, and the answer which the bookkeeper made to her, as she testified to it, is suspiciously like the answer made by the plaintiff to the mortgagor.

We think that on this question the foregoing and the other testimony in the case fully justified the justice in finding that the plaintiff had neither assented to the storing of the property nor had knowledge of the fact. This being so, it is unnecessary for us at this time to determine whether or not, where mortgaged property is stored with the knowledge of the mortgagor the warehouseman acquires a lien upon such property as against him. The consideration of that question should be left until the fact is proved and not found against the warehouseman as it is in this case.

Nor is it necessary to consider whether the mortgage was properly re-filed with a proper statement of indebtedness, for the mortgagor does not appeal from the judgment rendered, and even if he did this question would be immaterial, as the mortgage would be good against him without any re-filing. Having arrived at this conclusion, it is unnecessary to consider the other questions raised on this appeal, as the appellant has no standing in court to present them.

Under the circumstances of this case, if we had the power we would not award costs to the respondent, but section 2313 of the Code gives us discretion only where a judgment is modified or a new trial ordered, and this court has held in *Clark v. Carroll* (61 How Pr. 47), that sections 3060-3067 and section 3066, subdivision 3, provide that where a judgment is affirmed costs must be awarded to the plaintiff.

The judgment should therefore be affirmed, with costs.

BISCHOFF, J., concurred.

Judgment affirmed, with costs.

Fisher v. Monroe.

**JENNIE FISHER, Respondent, *against* ROBERT B. MONROE
et al., Appellants.**

(Decided January 5th, 1891.)

By an agreement between plaintiff, an actress, and defendants, theatrical managers, plaintiff was to "render services at such theaters, opera-houses, and halls as required" by defendants, for a certain period, for which defendants were to pay her a weekly salary. During the term fixed by the agreement, defendants refused to continue the employment, because of plaintiff's refusal to attend at a rehearsal as directed. Plaintiff brought an action for damages for alleged wrongful dismissal, in which she sought to excuse her failure to attend the rehearsal on the ground that, when directed to do so, on the day preceding the rehearsal, she was physically exhausted; but it did not appear that, at the time of the rehearsal, she was physically unable to attend. *Held*, that the contract would not necessarily be terminated by a mere temporary disability of plaintiff; but that as no sufficient excuse for her non-attendance at the rehearsal was shown, a verdict in her favor could not be sustained.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered on the verdict of a jury and an order denying a motion for a new trial.

The facts are stated in the opinion.

Hoover & Sulzer, for appellants.

Seaman Miller, for respondent.

BISCHOFF, J.—On or about September 1st, 1888, plaintiff, an actress, and defendants, theatrical managers, entered into an agreement, pursuant to which the plaintiff was to "render services at such theatres, opera houses, and halls as required" by the defendants, for a period of thirty weeks, or longer, at the option of the defendants, for which services the defendants agreed to pay the plaintiff thirty dollars per week. The agreement also provided, among other things, that either

Fisher v. Monroe.

party thereto might, upon two weeks' previous notice to the other, terminate the employment. Under this agreement plaintiff entered upon the performance of her services and continued doing so until about the 17th day of November, 1888 (being a period of ten weeks), and on which last-mentioned day the defendants refused to continue the employment, upon the ground that the plaintiff had violated the contract on her part by her refusal to attend a rehearsal at which her presence had been requested. The plaintiff thereupon brought this action against the defendants to recover damages for her alleged wrongful dismissal from their employ, the damages claimed being the salary for the time subsequent to her dismissal, to wit: thirty dollars per week for twenty weeks, less the sum of thirty-five dollars, earned by her from other sources; and alleged in her complaint that during the entire term of her employment she was ready and willing to perform all the conditions of the agreement on her part. The defendants denied that the plaintiff was ready and willing so to perform, and asserted that the plaintiff refused to perform the same, and that for good and sufficient cause the plaintiff was discharged from their employ, and had been fully paid for all services performed by her up to the time of such discharge. The action was tried and resulted in a verdict for the plaintiff for five hundred and sixty five dollars and interest, judgment upon which was duly entered, from which an appeal was taken to the General Term of the court below, where the verdict was sustained, and from which latter determination the defendants have now appealed to this court.

Upon the trial in the court below it appeared that the term of plaintiff's employment commenced September 3d, 1888, and that such employment continued until November 17th of the same year, on which day she was discharged by the defendants and informed that her future services would not be accepted by them, the ground for her discharge being her alleged refusal to attend at a rehearsal occurring on the day of her dismissal, and at which she had been directed to attend the day before. The only witness examined for the plaintiff was herself, and she admitted that she was requested to attend

Fisher v. Monroe.

such rehearsal, and that she failed to attend the same. She, however, sought to excuse her failure to attend the rehearsal upon the ground, that, when she was directed by the defendants to appear thereat (which she admits was on the day preceding the rehearsal), she was "physically exhausted;" and that in consequence thereof she could not attend. But it nowhere appears, from the evidence submitted to us upon this appeal, that the physical exhaustion of the plaintiff continued beyond the time fixed for the rehearsal, or that at the time of the rehearsal she was in fact physically unable to attend. Construing the term "physical exhaustion" most strongly in favor of the plaintiff, and admitting that at the time of her refusal to attend the rehearsal she was reduced to a state of physical debility, which temporarily incapacitated her for further service, the most which can be said of her excuse for such refusal is that she anticipated a continuance of such debility for a period which would prevent her presence at the rehearsal. That it did so continue, and that she was so debilitated at the time the rehearsal took place, did not appear upon the trial, so far as we are able to ascertain from the record of this appeal, and no excuse for her refusal to attend the rehearsal was therefore shown.

It will be borne in mind that this action is brought to recover for the loss of salary accruing to the plaintiff, subsequent to her alleged wrongful dismissal, and that compensation for services prior to such time is not a part of the damages claimed.

Assuming that plaintiff, at the time for which the rehearsal was called, was in such a state of physical debility as rendered her attendance impossible, and that upon her recovery she at once sought out the defendants, and offered to continue her services for the remainder of the term of employment, the question still remains, were the defendants obligated to accept such offer? This question underlies the plaintiff's entire cause of action, and hence it follows that, if the same must be determined adversely to her, she is not entitled to any part of the damages awarded her in the court below. I am unable to find that this precise question has ever been adju-

Fisher v. Monroe.

licated in this state, and counsel for the parties to this appeal do not in their briefs refer to any such adjudication.

It has repeatedly been held, that if a person under contract to render personal services of a peculiar kind, requiring the personal skill of the person who is to render the same, is prevented by reason of sickness from the performance thereof, his failure to perform will excuse him from such performance to such an extent that he will be enabled to recover upon a *quantum meruit* for the services actually rendered up to the time of his failure to continue the same by reason of such sickness (*Wolfe v. Howes*, 20 N. Y. 197; *Spalding v. Rosa*, 71 N. Y. 40; *Robinson v. Davison*, L. R. 6 Exch. 269, 40 L. J. Exch. 172; *Fuller v. Brown*, 2 Metcalf 440).

So it has been held that an employe who is prevented by sickness from fulfilling his agreement to render services cannot be held answerable in damages for such failure, to the employer (*Dickey v. Linscott*, 20 Me. 453). The principle underlying these cases is, that the contract was entered into by the contracting parties upon the implied condition of the continued ability of the party who is to render the services to perform, and that when unable to perform because of sickness or physical or mental incapacity proceeding from no wilful or deliberate conduct of the party, such inability is in consequence of an act of God and excuses performance. But what is the effect of the failure of the party of whom the services are required to perform, under the circumstances above described, upon the contract? To render the contract operative and binding upon the parties at its inception the obligations of the contracting parties must be mutually dependent, that is to say, the obligation of the party who is to receive the services, to pay, is conditioned upon the obligation of the party who is to render the services, to perform, and *vice versa*. If the contract of employment is to continue operative and binding, those inter-dependent obligations must continue to exist, and if one party is excused from the performance of his obligations, the obligations of the other party must likewise come to an end. In *Spalding v. Rosa* (cited above), ALLEN, J., says: "Contracts for personal services are subject

Fisher v. Monroe.

to this implied condition, that the person shall be able at the time appointed to perform them; and if he dies, or, without fault on the part of the covenantor, becomes disabled, the obligation to perform is extinguished."

In *Fenton v. Clarke* (11 Vt. 557), BENNETT, J., says: "In the case before the court, the plaintiff contracted with the defendant to labor personally for him for four months, at ten dollars per month, and by the terms of the contract was to receive no pay till he had worked the four months. These services being of a personal character, the contract could not be performed by another, and as the plaintiff was disabled to perform it himself, by reason of sickness, which was the act of God, upon the authority of the foregoing cases, the contract was discharged."

In *Dickey v. Linscott* (cited above), in dismissing the employer's claim for damages, Chief Justice WESTON uses the following language: "In a contract for the performance of personal manual labor requiring health and strength, we think it must be understood to be subject to the implied condition that health and strength remain. . . . The contract failing without the fault of the defendant, it would be neither just nor equitable to hold him obliged to labor for the plaintiff, when the days were longest, and labor in husbandry most valuable. The plaintiff was not obliged to accept such partial performance. He had a right to secure the services of another man, and might have had as many laborers as it was for his interest to employ."

It is apparent from the foregoing cases that the theory upon which the person who contracted to render services was permitted to recover upon a *quantum meruit*, for services actually performed at the time he became unable by reason of sickness to continue, was that, the condition of his continued ability to perform having failed, the contract itself had come to an end. He was excused from further performance, and, that being the case, the other contracting party was likewise excused from further performance of the contract on his part. To hold otherwise, and to regard the employer as under a continued obligation to perform his part, and to

Fisher v. Monroe.

receive the services of the employe when the latter has recovered from his sickness or disability, would thrust into every contract of employment requiring the personal services of skilled artists, artizans, and mechanics, in the varied enterprises and occupations of mankind, an element of uncertainty, which would lead to serious confusion, and to uncertainty of their duration. If, under such circumstances, the employer is compelled to speculate upon the chances of the early recovery of the employe, it can be readily seen that, if the enterprise is to be continued, he can only contract for like services at the peril of being required to pay both the former employe and those whose services have become necessary, because of the inability of the former employe to continue. To hold that, by the sickness of the employe, both contracting parties are discharged from further performances of the contract of employment, imposes no greater hardship upon such employe than is suffered by any person who is prevented from continuing his earnings by means of the employment of his services, since he is not required to forfeit compensation for the services actually performed.

A distinction should, however, be made between permanent and temporary disability arising from causes beyond the control of the employe. In the case of a mere temporary disability, the effect thereof would not in every case be to work a dissolution of the contract of employment (1 Wharton on Contracts § 323). In such cases I apprehend the rule to be, that if the temporary disability did not in any substantial manner prevent performance on the part of the employe, the employment must be regarded as continuing. It would, therefore, appear to be necessary in every such case to enquire whether or not the presence of the employe in the employer's service during the continuance of the disability was material and essential to the prosperity of the enterprise in which the services were required, and if such presence was not so material and essential, the employer is not relieved from his obligation to accept the services of the employe when the latter upon his recovery offers to continue. In the case at bar, the plaintiff was an actress, the service which she

Fisher v. Monroe.

was required to render was in performances at the defendants' theatres and opera houses, and to that end her services at rehearsals were undoubtedly at times not only necessary but indispensable; but it also appears that the plaintiff had been excused from attendance at some former rehearsals, and that the rehearsal at which she failed to appear might have proceeded without her, by the employment of some person to read her part, and from these facts it might be concluded that the failure of the plaintiff to appear at this particular rehearsal, for the non-attendance at which she was dismissed, did not in any material or substantial manner hinder the defendants from continuing their enterprise, or giving the contemplated theatrical performances. It was proper for the trial court to submit to the jury the question whether or not the plaintiff, by reason of her temporary disability, failed to perform the contract of employment on her part in any substantial manner, but inasmuch as defendants' counsel failed to make a specific request that the court so charge, his omission to submit that question to the jury cannot, for the purpose of this appeal, be assigned as error (*Winchell v. Hicks*, 18 N. Y. 559; *Muller v. McKesson*, 73 N. Y. 195).

For the reason, however, as above stated, that the evidence fails to show a sufficient excuse for the plaintiff's non-attendance at the rehearsal, at which she was directed to attend, I am of the opinion that the verdict is against the law and the evidence, and that the motion for a new trial upon the minutes should have been granted.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

J. F. DALY, Ch. J., and PRYOR, J., concurred.

Judgment reversed and new trial ordered, with costs to abide event.

Isaacs v. Mintz.

MORRIS ISAACS, Respondent, *against* ISRAEL MINTZ. WILBUR F. TREADWELL, Receiver, Appellant.

HYMAN LEVY, Respondent, *against* ISRAEL MINTZ. WILBUR F. TREADWELL, Receiver, Appellant.

(Decided January 5th, 1891.)

On motion to set aside levies and sales under executions, on the ground that the name by which defendant was designated in the proceedings, judgments, and executions, was not his real name, it appeared that he was equally well known by either name. *Held*, that although that fact was not alleged in the original actions, the executions were not void, as there was no misnomer.

APPEAL from an order of the General Term of the City Court of New York affirming an order of that court.

A motion was made at the Special Term of the City Court, by Wilbur F. Treadwell, as receiver of the property of the defendant, appointed in proceedings supplementary to execution against him, that levies and sales under executions in these actions against the property of defendant be set aside, and that plaintiffs therein be required to pay over the proceeds of such sales to the receiver. The ground of the motion was that the name "Isaac Mintz," in the proceedings, judgments, and executions in said actions, was a misnomer, the defendant's real name being "Israel Mintz," and not "Isaac;" and that the sales of his property under process in which he was so misnamed was void. The motion was denied, and the order entered thereon was affirmed on appeal by the receiver to the General Term. From the order of the General Term the receiver appealed to this court.

Carlisle Norwood, Jr., for appellant.

Arthur Furber, for respondent.

Isaacs v. Mintz.

J. F. DALY, Ch. J.—The City Court found upon the facts before it that the defendant, Mintz, was equally well known by the names Isaac and Israel, and held, therefore, that there was no misnomer in the proceedings and process. There was abundant evidence to sustain this conclusion. The defendant's wife swore that some persons called him Isaac, and although she could not recollect any particular person who did so in her presence, the value of her testimony was not thereby destroyed. The defendant admitted to the deputy sheriff that his name was Isaac. He stated, when served with the summons, that his name was Isaac; and the affidavit of Hyman Levy says that in Hebrew, the names "Isaac" and "Israel" are interchangeable. The appellant, however, claims that if the defendant were equally well known by both names, that fact should have been alleged in the complaint and the defendant should have been sued under one of the names with an *alias*. This was not necessary. If a man be known by two names he may be sued by either and process against his property or his person in such an action may be justified by showing that he was equally well known by both names.

In *Gurnsey v. Lovell* (9 Wend. 319), SAVAGE, Ch. J., says: "The defendants could not justify the arrest of the plaintiff by a wrong name, though he was the person intended to be arrested, unless he was known as well by one name as the other," citing *Mead v. Haws* (7 Cowen 832), in which he said it was decided in *Shadgett v. Clipson* (8 East 328), that the defendant could not justify an arrest of the plaintiff by a wrong name though he was the person intended to be arrested, unless it was shown that he was known by one name as well as the other. And reference was made to the case of *Griswold v. Sedgwick* (6 Cowen 456), where SUTHERLAND, J., cited and followed *Cole v. Hindson* (6 Term Rep. 234), in which Lord KENYON remarked that the defendants were not justified in seizing the goods of Aquila Cole under a *distringas* against Richard Cole; and that the averment in the plea that Aquila and Richard were the same person did not assist the defendants, as they had not also averred that the plaintiff was known as well by one name as the other.

Isaacs v. Mintz.

In *Farnham v. Hildreth* (32 Barb. 277), all the foregoing cases were cited, and the decision in *Cole v. Hindson* quoted; and ALLEN, J. says: "It is well settled that a defendant in an action for false imprisonment cannot justify the arrest of the plaintiff by a wrong name, though he is the person intended to be arrested, unless it is shown that he is as well known by one name as the other."

From these cases it appears that even though the defendant be sued by a name not his real one, and his property or his person be taken by process in such a name, yet in an action for trespass or false imprisonment, such process would be justified by showing that he was equally well known by both names. It is nowhere stated that in the original action both names must be set forth. It is the language used in *Cole v. Hindson* in regard to what is necessary in the plea of justification which the appellant here wrongly interprets as holding that there must be the same averment in the original complaint.

The City Court decided correctly, therefore, in holding that the executions were not void because the defendant was named therein as Isaac Mintz and not as Israel Mintz, the court being satisfied that he was equally well known by both names.

The question of fraud was also properly disposed of. It would not be advisable to try such an issue upon a motion. The receiver has his action to set aside the judgments of these plaintiffs on the ground that the debts upon which they were obtained were fictitious, if he is disposed to try that issue. We think he loses no right in that respect by this decision.

The order appealed from should be affirmed, with costs.

BISCHOFF and PRYOR, JJ., concurred.

Order affirmed, with costs.

Lines v. Shepard.

ANDREW E. LINES, Respondent, *against* CHARLES D. SHEPARD, Appellant.

(Decided January 5th, 1891.)

The claim on which plaintiff brought suit against defendant for money received, arose out of transactions of plaintiff with one K., in a stock-brokerage business carried on by K. in part of a drinking saloon of which defendant was proprietor. It was conceded that K. acted as defendant's agent in the first of such transactions with plaintiff, but defendant testified that, before the later transactions, an arrangement was made between him and K. that the latter should carry on the business on his own account, and K. testified that he told plaintiff of the change; but plaintiff denied this and denied that he knew of any change in the business, although changes were made in the signs, etc., by inserting K.'s name. There was some evidence that these changes were but a cover, and were not made in good faith. *Held*, that as the question whether such changes were made as to put plaintiff on inquiry was a mixed question of law and fact, the judgment of the trial justice in favor of plaintiff would not be disturbed on appeal.

APPEAL from a judgment of the District Court in the City of New York for the Tenth Judicial District.

The facts are stated in the opinion.

Walter K. Griffin, for appellant.

John M. Tierney, for respondent.

BOOKSTAVEN, J.—The complaint was for money received and the answer was a general denial. The claim arose out of certain stock transactions which took place on the defendant's premises known as the "White Elephant," and the question to be determined was whether these transactions were with one William K. Klausman as principal, or with him as the agent of the defendant, and was one of fact to be determined by the evidence. Without stating this evidence in detail, we deem it sufficient to say that an examination of the testimony, aided by the painstaking and careful brief of defendant's

Lines v. Shepard.

counsel, fails to convince us that there is any such preponderance of evidence in defendant's favor as would warrant us in reversing the judgment on that account, while the evidence on plaintiff's behalf if believed by the justice is quite sufficient to sustain the judgment, and we see no such inherent weakness or improbability in it as would lead us to discard it as untruthful or disingenuous.

From the testimony it appears that the defendant is sole proprietor of the "White Elephant" situated on Broadway between 30th and 31st Streets, which appears to be a drinking saloon and a place of amusement, having connected with it a shooting gallery, bowling alley, billiards, restaurant, bar-room, etc. There was also a stock-brokerage business carried on in a small way, and apparently entirely subsidiary to the drinking saloon, etc. The defendant's testimony tends to show that in the beginning of that business there was associated with him one Dederich who had some interest in the business, but as it had been small and but little profits had accrued therefrom Dederich practically abandoned the business before the plaintiff had any dealings in connection therewith. William E. Klausman seems to have been, in one person, the superintendent of the business, its bookkeeper, clerk, telegraph operator, and office boy, all on a salary of \$50 per month.

Confessedly the first transaction on plaintiff's part was with Klausman, as agent, shortly before the first of May, 1890, but defendant's testimony tends to show that some arrangement was made between the defendant and Klausman by which the latter should carry on the business after that time on his own account. The business was carried on in a small enclosure back of the bar-room, and in order to get to it it was necessary to pass through that room. On a glass partition near the street and from 16 to 20 feet away from this enclosure, previous to the first of May, there had been a sign, "C. D. Shepard & Co., Commission Brokers, Private Wires to Wall Street, Stocks, Bonds and Petroleum." About the first of May the name "C. D. Shepard & Co." was removed and that of "Wm. D. Klausman" substituted.

Lines v. Shepard.

Klausman testified that he told the plaintiff of the new arrangement and that he was thereafter to carry on that business, but this is denied by the plaintiff, who also testifies that while he noticed a change in the sign he did not connect it with any change in the business and knew of no such change. To meet this the defendant introduced certain alleged copies of bought and sold memoranda signed by Klausman, without any other signature. This change plaintiff also alleges he did not observe, and there is considerable doubt whether the papers produced upon the trial were exact copies of the memoranda originally given.

While it is true, as claimed by the learned counsel for the defendant, that it is not necessary, in order to charge a customer with notice of the retirement of a former proprietor with whom he has been accustomed to deal, that a notice of a change of proprietorship should be positive and explicit, and that it is enough if such change is made as to put such customer upon inquiry (*Holt v. Allenbrand*, 52 Hun 277; *Lovejoy v. Spofford*, 93 U. S. 430; *Claflin v. Lenheim*, 66 N. Y. 306), yet whether such changes have been made as to properly put the customer upon inquiry, is always a mixed question of fact and law to be determined by the justice, and in this case we cannot say from the evidence that he did not properly determine it. From the evidence we think he might well have found that the various changes made were but a cover and not made in good faith, for Klausman was a man of little or no responsibility; he paid nothing for the business and no arrangement was made with the defendant about the rent; he used defendant's tickets and the blackboard on which the quotations of certain stocks were made, just as they had been before, and neither paid nor agreed to pay the defendant anything for them. We, therefore, think the judgment was proper and should be affirmed, with costs.

BISCHOFF, J., concurred.

Judgment affirmed, with costs.

O'Neill v. Crotty.

HENRY O'NEILL *et al.*, Respondents, *against* JOHN S. CROTTY, Appellant.

(Decided January 5th, 1891.)

At the trial of an action for goods sold and delivered there was evidence that the goods were part of a larger quantity which plaintiffs had agreed with defendant to manufacture abroad, according to sample, and to import and deliver as they arrived ; but it also appeared that the price was a specified sum per gross, to be paid a certain number of days after delivery. *Held*, that this sustained a finding that the price of the goods delivered became due and payable at the expiration of the term of credit, and that plaintiffs might recover as on a sale and delivery of such goods, notwithstanding such delivery was under a contract for the sale of a greater quantity ; that proof of such special contract established no defense, a breach thereof not being pleaded as a counterclaim ; and that evidence that the goods did not conform to the sample was not admissible, as no counterclaim was set up on that ground.

APPEAL from a judgment of the General Term of the City Court of New York affirming a judgment of that court entered on the decision of the judge on a trial by the court without a jury.

The action was for the price of goods sold and delivered by plaintiffs to defendant.

The complaint alleged the sale and delivery, between June 11th and August 31st, 1889, to the defendant of 155 gross of embroidery edging of the value of \$310 and for which defendant promised to pay that sum on or before October 10th, 1889, and that no part thereof had been paid although the time within which payment was to have been made had expired. The answer was a denial of all these allegations.

Upon the trial one of the plaintiffs, George Quackenbush, was called by plaintiffs to prove the sale. Upon cross-examination the defendants elicited that the 155 gross sued for was a delivery under a special executory contract for the sale of 200 gross of embroidery edging to be manufactured according to sample in 100 natural color and 100 white, at

O'Neill v. Crotty,

\$2 per gross ; that after the first delivery under the contract (100 gross natural color on August 28th), the defendant complained about the quality of the goods, and the plaintiffs told him if he could not use them to return them ; that the defendant then required the white to be delivered, and plaintiffs delivered on August 31st, 55 gross of the white ; that defendant then came to complain or to make a claim, and plaintiffs again told him that if he could not use the goods to return them ; that the defendant then went away and brought an action against plaintiffs ; that plaintiffs were ready to go on and furnish the balance of the goods if he would have accepted them. There was some evidence from which it might be inferred that the goods were to be paid for as delivered ; the terms of sale were " 30 days dating and ten days time," which meant that the defendant's bills were to be dated thirty days from the date of delivery and he had ten days thereafter in which to pay.

At the close of the testimony of the witness Quackenbush, the plaintiff (who had objected to the cross-examination as to sale by sample on the ground that it was not pleaded and as immaterial, irrelevant and incompetent) made a motion to strike out the evidence in reference to the goods delivered conforming to the sample, and to strike out the evidence in reference to the special contract. The motion was granted and the defendant excepted. No other evidence was offered by either party. Defendant then moved to dismiss the complaint, on the grounds, (1) that the plaintiff had failed to prove the cause of action set forth in the complaint—failed to prove any sale or agreement to sell 155 gross of edging and any delivery under such an agreement ; (2) that the only sale shown by the uncontradicted evidence was of 200 gross of edging and that the proof was at variance with the complaint ; (3) that the agreement for the sale of 200 gross was entire and a full delivery thereunder was a condition precedent to a recovery, and that plaintiff had failed to perform said agreement. The motion was denied and the defendant excepted. The court found as matter of fact a sale and delivery of 155 gross at \$2 per gross which became due and

O'Neill v. Crotty.

payable on October 10th, 1889. The defendant excepted to this finding, but made no requests to find as to any fact or conclusion of law. The judge rendered judgment for plaintiffs for \$317.30, with costs. Defendant appealed from the judgment to the General Term of the City Court, which affirmed the judgment; and from the judgment of the General Term defendant appealed to this court.

J. Tredwell Richards, for appellant.

George M. Baker, for respondents.

J. F. DALY, Ch. J.—[After stating the facts as above.]—Where separate deliveries are contemplated in a contract of sale, and payments are to be made upon each delivery, an action may be maintained therefor as for the sale and delivery of the particular goods sued for. In such an action the vendee may set up the contract for the whole, plead the failure of the vendor to make other deliveries under it, and claim damages for such breach; but if he set up the breach without a counterclaim it is no defense to the action. In *Avery v. Wilson* (81 N. Y. 341), there was an indivisible contract and a delivery of part with a waiver of a complete delivery of the whole as a condition precedent to payment for such part. The action was for goods sold and delivered. Defendant set up the special contract for the whole, and a refusal to deliver the residue. The court said: "While the defendants had the right to recoup any damages sustained by a failure to deliver the glass as agreed upon, or to bring an action to recover the amount of the same, they cannot under the pleadings in this action prevent a recovery for the value of the glass actually delivered, as they have not set up a counterclaim, but simply based their defense on the non-performance of the contract."

This rule undoubtedly governs the case of an agreement to pay for goods as delivered, and in the case before us there was some evidence from which it might be inferred that such was the contract between these parties. The goods were to

O'Neill v. Crotty.

be manufactured abroad and imported, and deliveries were made as they arrived; "bills were to be dated 30 days ahead from the date of delivery, and if he paid his bills in ten days he was to get a seven per cent. cash discount;" . . . "the credit for these goods expired October 10th (which was 40 days after the last delivery);" . . . "they were sold at two dollars a gross, thirty days dating and ten days time." This was the testimony of the plaintiff and was not contradicted. There was evidence, therefore, to sustain the finding of the trial judge that the amount sued for became due and payable October 10th, 1889; and that is all we are required, as an appellate court, to inquire into upon a simple exception to a finding of fact. We are only authorized "to review the facts for the purpose of ascertaining whether any allowable construction of which they are capable will warrant the conclusion of fact at which the judge or referee has arrived" (*Stilwell v. Mutual Life Ins. Co.*, 72 N. Y. 388). We cannot review the facts "after an affirmance by the General Term, so long as there is any evidence tending to support the findings" (*Potter v. Carpenter*, 71 N. Y. 75).

The defendant therefore having become indebted, as found by the trial judge, for the portion of the goods delivered, an action as for a sale and delivery thereof was maintainable; and the motion to dismiss the complaint was properly denied, notwithstanding such delivery was under a contract for the sale of a greater quantity. There was no variance between the pleading and the proof.

The exception to the granting of the plaintiff's motion, made at the close of plaintiff's case, to strike out the evidence elicited by defendant upon cross-examination of plaintiff's witness in reference to the goods delivered not conforming to the sample, and also the evidence in reference to the special contract, does not show error. No claim for damages on account of the goods not conforming to the sample was set up in the answer; and proof of the special contract constituted no defense, as complete delivery of the whole of the goods thereunder was not a condition precedent to payment. It is proper to say here that, under the denial in the answer of a sale of

Ramsay v. Barnes.

155 gross, the defendant was entitled to show exactly what the contract of sale was, and if this involved proof of a special contract for 200 gross he was entitled to prove it; for there was no way of disproving plaintiffs' allegation except by showing the facts (*Dietrich v. Dreutel*, 48 Hun 342; *Manning v. Winter*, 7 Hun 482). The trial judge allowed this proof to be given by cross-examination of the plaintiffs' witness; and I understand that in striking out the evidence of the special contract at the close of the testimony he did no more than rule that such special contract as proved constituted no defense under the circumstances disclosed by the testimony. The defendant offered no evidence to show that payments under the contract did not become due until all the deliveries thereunder were made, but left the plaintiff's evidence in that respect uncontradicted. Under those circumstances the special contract was no defense and evidence thereof was immaterial.

The judgment should be affirmed, with costs.

BISCHOFF and PRYOR, JJ., concurred.

Judgment affirmed, with costs.

EMMA K. RAMSAY, Respondent, *against* REON BARNES,
Appellant.

(Decided January 5th, 1891.)

In an action by the indorsee of a promissory note signed "G. B., per R. B., Atty.," brought against R. B. for a balance due on the note, the complaint contained a paragraph alleging that it was agreed between plaintiff and defendant "that the matter was not one of G. B., but a personal one of the defendant," and that he owed plaintiff a specified sum, and that that was the true balance due upon said note. The only denial in the answer of these allegations referred expressly to said paragraph of the complaint, and denied the precise words of all its averments except the statement of the personal obligation of defendant, to which no reference was made.

Ramsay v. Barnes.

Held, that this was, in effect, an express admission of that allegation ; and that no question of the consideration for such agreement, or other question affecting its validity, could be raised.

The force of such admission was not destroyed by proof of a writing made by defendant, reciting that he had purchased the note, and that said sum was the balance due on the purchase ; such writing not being signed by defendant and not enforceable against him as an agreement.

Where defendant pleads the statute of limitations, a payment on account of the demand sued for may be proved by plaintiff, although not alleged in his complaint ; he is not bound to anticipate the defense.

Testimony that certain payments were made on account of the debt sued for, is not necessarily the conclusion or opinion of the witness ; and, where given without objection or cross-examination as to the circumstances, is sufficient to take the case out of the statute of limitations.

To show that certain money paid by defendant to plaintiff was a payment on account of a debt due from the former to the latter, for money loaned, taking it out of the operation of the statute of limitations, plaintiff testified that she asked defendant for money on account of the loan to pay her rent, and he drew a check for her ; and her brother testified that defendant afterwards told him that he had paid the amount to plaintiff on account ; but defendant testified that plaintiff made no request for a payment, but said she was in arrears for rent, and about to be dispossessed, and he gave her his check, which bore on its face the statement that it was for rent of her house. *Held*, that a finding that the payment was on account of the debt, and not a loan from defendant to plaintiff, was sustained by the evidence.

APPEAL from a judgment of this court entered upon the decision of the judge on trial by the court without a jury.

The action was brought to recover a balance of \$429.94, with interest from December 15th, 1885, being the balance claimed to be due upon a certain promissory note made by defendant, as follows :

“ \$550.

New York, April 25th, 1876.

“ Two months after date I promise to pay to Jacob Ramsay, Jr., or order, five hundred and fifty dollars for value received, with interest at the rate of 7 per cent. per annum, having deposited with him as collateral security, with authority to sell the same at public or private sale on the non-performance of this promise, and without notice, one bond for

Ramsay v. Barnes.

\$500 of the North River & New York Steamboat Co., numbered 171.

“ Gaybert Barnes,
“ Per Reon Barnes, Atty.”

Upon trial by the court, a jury having been waived, judgment was rendered for plaintiff for \$480.35, with costs. From the judgment defendant appealed.

William B. Hornblower, for appellant.

Joseph M. Williams, for respondent.

J. F. DALY, Ch. J.—It was found by the trial judge, first: that the note in question was made and delivered by Reon Barnes for value received; second: that it was indorsed and delivered to the plaintiff by the payee for good and sufficient consideration together with the bond; and, third: that thereafter and on or about March 14th, 1877, it was agreed between the plaintiff and defendant that the matter was not one of Gaybert Barnes, but a personal one of the defendant; and that at that date he owed the plaintiff the sum of \$518.55, and that that was the true balance due upon said note.

The first point of the appellant upon this appeal is that there is absolutely no evidence to support the third finding of fact, upon which alone the conclusion of law is based that plaintiff is entitled to judgment against defendant. It would seem that the appellant has overlooked the clear admission of this fact in the pleadings. The complaint alleges, “Third: That thereafter and on or about the 14th day of March, 1877, it was agreed between the plaintiff and the defendant that the matter was not one of Gaybert Barnes, but a personal one of the defendant, and that at that date he owed the plaintiff the sum of \$518.55, and that that was the true balance then due upon said note.” The only denial in the answer of these allegations is as follows: “Third: Denies that it was agreed between the plaintiff and the defendant on or about March 14th, 1877, that the defendant then owed the plaintiff the sum of \$518.55 or that that sum was the true balance then due upon the said promissory note as is alleged in the third paragraph of the com-

Ramsay v. Barnes.

plaint.” A denial so worded as to put in issue in the precise words of the allegation certain averments of the third paragraph of the complaint, and referring expressly to that paragraph which contains the whole charge or statement of the personal obligation of the defendant, and which yet avoids all reference to the latter, has all the force of an express admission of the portion which is not denied.

It was not necessary for the plaintiff to give evidence of an allegation so admitted. It is claimed, however, that by introducing a certain paper drawn up and delivered by the defendant on the 14th of March, 1877, (but not signed by him) the plaintiff showed that there was no such transaction as alleged in the complaint. That paper recited that Reon Barnes had *purchased* the note and bond in question and that \$518.55 is the true balance due upon said purchase. It was offered by plaintiff as a memorandum made by defendant showing the amount admitted to be due, and the testimony was that it was given as an agreement as to the amount due. It was not an agreement; it was not enforceable against the defendant; it was a mere statement by him which cannot have the effect of destroying the force of his solemn admission in the pleadings as to the admission and agreement that the obligation to which he affixed the name of Gaybert Barnes as principal and his own as attorney was in fact his own contract.

It is argued, however, that there was no consideration for any such agreement. As the agreement was admitted by the pleading, neither the question of consideration nor any other question affecting its validity could be raised. Besides, no such objection was made at the trial where it might have been obviated by proof. The same consideration disposes of the suggestion that, the note being signed on behalf of Gaybert Barnes as principal, it could not be shown by parol to be the engagement of a third party (*Briggs v. Partridge*, 64 N. Y. 363). But even if the agreement had not been admitted in the pleadings, and even if the objection had been taken at the trial, there is no force in this suggestion. For this is the case of a note signed by the party sought to be

Ramsay v. Barnes.

charged, though he signed it apparently as agent of another. A party may sign a note by any name he pleases and if he intend to bind himself by it he is liable upon it (*De Witt v. Walton*, 9 N. Y. 571; *Brown v. Butchers & D. Bank*, 6 Hill 448). So, in this case, while Reon Barnes signs the name of Gaybert Barnes with his own name as "Atty," he admits and agrees that it is his obligation, and therefore he is bound by it.

The remaining question upon this appeal arises under the statute of limitations which was pleaded as a defense, the note in question having matured on June 28th, 1876, and the action having been commenced on December 26th, 1886. The plaintiff alleged in her complaint that the defendant made two payments of \$20 each on account of said note in or about March, 1878, and that she received \$75 as a dividend upon the bond about January 1st, 1880, and that on December 15th, 1885, the defendant paid her \$266.66; leaving the balance sued for of \$429.94. The answer denies the making of any of these payments on account of the note, and denies any knowledge of the payment of any dividend upon the bond, and counterclaims the sum of \$266.66 which he alleges he lent to the plaintiff on December 15th, 1885. All of these payments were proved, and in addition a payment of \$41 in 1883. Evidence of this last amount was objected to because not alleged in the complaint. But a plaintiff is not bound to anticipate a plea of the statute by setting forth in his complaint the payments that he intends to rely upon to take the case out of its operation. Further objection is made that the circumstances under which the payment was made are not shown, and that proof of a mere payment of a particular sum is not evidence of an acknowledgment that more was due. It is sufficient answer that the witness was permitted without objection to state the several payments in answer to the question, "Has anything been paid by the defendant on account of this amount due?" This question did not necessarily call for a conclusion nor an opinion of the witness, but for a fact. He was not cross-examined as to the circumstances of each payment, nor was objection made that

Ramsay v. Barnes.

such circumstances were not shown. The testimony of payment was therefore competent as evidence of a part payment of an acknowledged indebtedness to the amount due.

As to the payment of \$266.66 on December 15th, 1885, which plaintiff claims to have been a payment on account, and which defendant claims to have been a loan made by him to plaintiff, the testimony was conflicting, but there was ample evidence to sustain the finding. The plaintiff swore that she went to defendant and asked for money on account of the money loaned (for it appeared without contradiction that the note was originally given by defendant for a loan of money to him from the plaintiff, through her brother, the payee of the note, and that the note was taken for her benefit), that she asked for the money to pay her rent, and he drew the check for her. The witness Jacob Ramsay testified that two days after he met defendant on the treasury steps on Wall Street; that he was on the opposite side and defendant whistled to him, he went over, and defendant said, "I saw Emma the other day and gave her \$250 on account; now, Jake, I will fix up the balance of that as soon as possible." Defendant testified that no request was made for a payment, but that plaintiff called upon him and said she was in arrears for rent and was about to be dispossessed, and he gave her his check payable to her order and bearing on its face the statement ("for rent of No. 40 W. 38th St. for mo. of Dec."). The check was produced.

Upon the evidence of the original loan from plaintiff to defendant of the money for which this note was given (which as I have said was not contradicted), upon the admission in the pleading of an agreement that the note was his personal obligation, upon the guarded testimony given by him upon commission, "No recollection of ever assuming the payment of the note set out in the complaint, or of agreeing with the plaintiff that I owed her the sum of \$518.55 or any sum upon said note; and I think I never did," and upon the testimony of the plaintiff and her brother as opposed to that of the defendant, there does not seem to have been

Rotter v. Goerlitz.

room for any other conclusion than that arrived at by the learned trial judge upon the case before him.

The judgment should be affirmed, with costs.

BISCHOFF and PRYOR, JJ., concurred.

Judgment affirmed, with costs.

MORRIS ROTTER, Appellant, *against* JOHN GOERLITZ, Respondent.

(Decided January 5th, 1891.)

An owner of two adjoining buildings is not liable to the tenant of one of them under a lease from him, for injuries to the tenant's goods caused by the removal of the walls of the other building, leaving the demised premises exposed, where the lease contains no covenant to repair or keep in repair, or that the adjacent property should remain in the same condition as at the time of hiring, and there was no deceit or false representations as to the condition of the demised premises ; and where the work was done under a contract with the owner giving the contractor sole charge of the work, and providing that the walls of the demised premises should not be disturbed, and it appears that no injury to the tenant or invasion of his premises was contemplated in making the contract or was necessarily involved in doing the work under it.

APPEAL from a judgment of the District Court in the City of New York for the Third Judicial District dismissing plaintiff's complaint.

The facts are stated in the opinion.

John M. Tierney, for appellant.

Maurice Untermeyer, for respondent.

BOOKSTAVEN, J.—The respondent was the owner of the premises known as Nos. 17 and 19 Greenwich Avenue in this City, and the appellant was in occupation of the ground and basement floor of No. 17 as a tenant under a written lease

Rotter v. Goerlitz.

expiring May 1st, 1891. The respondent, desiring to build on No. 19, made a contract with Theodore E. Tripler to take down the old building on it and remove the debris. Mr. Tripler was to have sole charge of that work, and was especially requested by the respondent not to interfere with the walls of No. 17 in doing it. In the latter part of June or the first of July Mr. Tripler and his men commenced work under this contract, and it is claimed by the appellant that, in removing the walls of No. 19, the entire westerly side of the extension occupied by him on No. 17 was exposed, and his carpets, furniture, etc., in that apartment were injured by rain. This action is brought to recover for that injury.

It is true that in every written lease there is an implied covenant on the part of the lessor that the lessee shall have quiet enjoyment of the premises during the demised term, which is not affected by the statute declaring no covenants shall be implied in conveyances of real estate (*Moffat v. Strong*, 9 Bosw. 57; *Mayor v. Mabie*, 13 N. Y. 151; *Mack v. Patchin*, 29 How. Pr. 20, aff'd 42 N. Y. 167).

But as was said by BEARDSLEY, J., in *Cleves v. Willoughby* (7 Hill 86), speaking of implied covenants in instruments relating to land, "That doctrine has a very limited application for any purpose to a lease for years, and in every case has reference to the title, and not to the quality or condition of the property," and in effect is no more than a covenant that the lessor has a right to lease the premises hired, and will defend that right on peril of forfeiting his claim for rent. The law recognizes no other implied covenant in respect to leases that we are aware of, unless it be in the case of a ready furnished house or apartment, that it is reasonably fit for immediate use, and even this has been seriously questioned, if not entirely repudiated, as the law of this state (*Franklin v. Brown*, 118 N. Y. 110; *Edwards v. New York & H. R. Co.*, 98 N. Y. 248; *Howard v. Doolittle*, 3 Duer 475; *Meeks v. Bowerman*, 1 Daly 99).

On the trial of this action it was admitted that the respondent had given the appellant a lease of the lower floor and basement of the premises No. 17 Greenwich Avenue

Rotter v. Goerlitz.

which would not expire until May 1st, 1891. But no attempt was made on appellant's behalf to show that this lease contained either a covenant to repair or keep in repair the premises so hired, or that the adjacent property should remain in the condition it was at the time of the hiring, during the whole or any part of the term. Nor was it claimed that any deceit was practised or false representations made by the appellant as to the character or condition of the premises in question, or of the sufficiency of the supporting walls if left to stand by themselves; nor were any representations made as to the fitness of the premises for the purposes for which they were let. Whatever may be argued as to implied covenants, it cannot be claimed that, under such a state of facts, the law of this state will inject into leases a covenant that the landlord will keep in repair the demised premises, or that the adjacent property will remain in the condition in which it was at the time of the letting, when the tenant neglects to have such covenants inserted in them.

On the contrary, Mr. Justice BEARDSLEY in *Cleves v. Willoughby* (*supra*), says: "The maxim *caveat emptor* applies to all property, real, personal, and mixed, and the purchaser generally takes the risks of its quality and condition unless he protects himself by an express agreement on the subject." And this has been reaffirmed with emphasis in *Edwards v. New York & H. R. Co.* (*supra*), and more recently in *Franklin v. Brown* (*supra*). Nor is the hardship of such a doctrine in this case so great as it at first appears. The appellant had occupied these premises for 10 or 12 years previous to the last hiring; he if anybody should have known whether or not the extension had independent walls, or was merely a lean-to, built against the wall of the adjacent property. We think it clear from the testimony the landlord did not; he had No. 19 surveyed by a competent surveyor before he let the contract to remove the building on it to Mr. Tripler, who reported to him that both 17 and 19 had independent walls, and in making the contract he especially provided that the building and walls of No. 17 should not be disturbed. We also think that the justice who tried the case

Rotter v. Goerlitz.

was fully justified by the evidence in finding, as he must have done in rendering judgment for the defendant, that no part of the premises No. 17 was disturbed by the respondent directly, and that the performance of the contract he made with Tripler would not necessarily cause a disturbance of these premises and in this way inflict an injury on appellant.

All the misapprehension in this case arises from the fact that the respondent owned both lots, and his rights and duties as to each have been confused. Let us suppose that A. owned No. 19, and B. owned No. 17, the lower part of which he had let to C. Now, had A. torn down the walls of his house only, and thus left the broadside of the extension on No. 17 exposed to the weather, because that extension never had any wall of its own: who would have thought of holding A. liable to C. for any injury his furniture might have sustained by reason of such exposure? And why not? Simply because A. owed no duty to C. except to remove his walls carefully so as not to injure C.'s property through negligence. Neither, under the principles of law above stated, would B. have been liable to C.; for B. had neither covenanted to keep in repair, nor that the adjacent property should remain as it was at the time of the hiring, and C. had rented the premises as they were, at his own risk. In the absence of fraud, deceit, false representations, and of any express covenant, we know of no rule of law by which the respondent can be held for damages under such circumstances simply because he owned both lots; his rights and duties, as far as the different tenants in each were concerned, were in no wise affected thereby.

The only other ground on which respondent could have been held liable in this case was because of some negligence in removing the building on No. 19 whereby appellant's property was injured.

But it is a rule of law so well settled in this state as to need no discussion here, that where a contractor has undertaken the performance of certain specific work in such a way that the owner has no control or authority over the manner of its performance, the owner is not responsible for the con-

Rotter v. Goerlitz.

tractor's negligence in doing the work. This rule is as applicable to work on real property as on personal (*Goudier v. Cormack*, 2 E. D. Smith 254; *McEnanny v. Kyle*, 14 Daly 268; *Blake v. Ferris*, 5 N. Y. 48; *Pack v. City of New York*, 8 N. Y. 222; *McCafferty v. Spuyten Duyvil & P. M. R. R. Co.*, 61 N. Y. 178).

In order to make the owner liable for the negligent acts of another, the relation of master and servant, or principal and agent must exist between them. The evidence does not establish any such relation between the respondent and Mr. Tripler. On the other hand, it shows beyond doubt that Mr. Tripler had sole charge of the work, and the respondent had nothing to do with it.

The only exceptions to the last above-stated rule which we know of, are where the work originally contracted to be done is unlawful in itself, is extremely hazardous, as blasting (*Buddin v. Fortunato*, ante, p. 195; *Hay v. Cohoes Co.*, 2 N. Y. 159; *Hexamer v. Webb*, 101 N. Y. 387), or necessarily involves the doing of an injury to another. In such cases the owner cannot be allowed to shift the burden of his own wrong or the extreme hazard, to the shoulders of his contractor. But taking down an old building is neither unlawful nor does it involve unusual hazard. The question then is, did the performance of the contract necessarily involve the doing of an injury to the plaintiff? Obviously, if the walls of the two buildings were entirely independent, tearing down one would in no way involve the walls of the other. In *Earl v. Beadleston* (42 Super. Ct. 294), it was held in the case of a party wall which the adjoining owners were bound to keep up, that one of them could not maintain an action against the other, who had employed a contractor to take down his house, which involved the removal of the beams resting in the party wall, for it was said that this could be done without necessarily weakening the wall.

In this case appellant, and one witness in his behalf, testified that when the rear part of the wall on No. 19 was torn down, it exposed the whole of one side of the extension before mentioned, and that there was no other protection to

Rotter v. Goerlitz.

that part of his premises than the wall so torn down. This is denied both by the respondent and Mr. Tripler, who testify that both buildings had independent walls except along a part of the extension, and there the wall torn down was wholly on lot No. 19, and Mr. Tripler testified that the extension in question next the wall torn down, was protected by a lath and plaster partition left standing when the other wall was removed, and that there was no opening except one place near the ceiling, which was closed with board in a short time. It is apparent from the testimony that the extension must have had some kind of support next to No. 19, to permit these boards to be fastened upon it, and to support the roof, which remained intact.

On this state of facts, the justice who tried the case rendered his decision in favor of the respondent, and must have found that the work contracted to be done would not necessarily injure the appellant. While the evidence is conflicting, we think there was quite enough given by the respondent to justify the conclusion arrived at. We are satisfied from the evidence that no injury to appellant nor invasion of his premises were contemplated by respondent when he made the contract, and that none were necessarily involved in doing the work under it.

The judgment should therefore be affirmed, with costs.

BISCHOFF, J., concurred.

Judgment affirmed, with costs.

Curtis v. Soltau.

**J. GARDNER CURTIS, Respondent, *against* ROBERT SOLTAU,
Appellant.**

(Decided January 5th, 1891.)

A writing signed by one only of the parties to an agreement, and purporting to contain his obligation only, not undertaking to bind the other party, is merely an admission of the engagement of the party signing it, and does not preclude him from showing by parol what was the undertaking on the part of the other party.

A memorandum of a sale of goods was in the form of a bought note, containing the obligation of the buyer, and no more, and was signed by the buyer only. *Held*, that, in an action for part of the price remaining unpaid, the agreement having been executed, so that there was no question of the statute of frauds, parol evidence was admissible for defendant to prove a sale by sample and a warranty, and a breach of the warranty.

APPEAL from a judgment of this court entered upon a verdict rendered by direction of the court and from an order denying a motion for a new trial.

The action was brought to recover \$2,589.08, balance of the purchase price of certain lots of gutta percha sold on September 6th, 1888. The following is the only memorandum of sale which was made:—

“ Boston, Sept. 6th, '88.

“ Bought of Messrs. J. Gardner Curtis & Co., Boston, the following lot of gutta percha :

	C		XX WP		XX
“ Ex Brilliant. . . .	20 pcs.		14 packages		34 packages
“ Chelmsford	86 “		34 “		104 “
“ Slammat	93 “		67 “		87 “
“ Mimi			34 “		9 “

ab. 199 pcs. ab. 149 bkts. ab. 184 bkts.

at the price of 32½ for C : 12c. for $\frac{XX}{WP}$: 12c. for XX. Terms cash 10 days less 1 per cent. brokerage from delivery of each lot as taken. Lots all to be taken off by Soltau during month

Curtis v. Soltau.

of September, 1888. Tare of each mark to be ascertained by taring actually 10 per cent. (ten per cent) of same and to be applied on the lot. Baskets to be in good order and any repairing to be done for seller's account. Sample packages Soltau got to be settled at above prices for the three different marks.

“ ROBERT SOLTAU.

“ Please make out three different delivery orders. One delivery order for each mark.”

The answer set up that the sale was by sample and that plaintiff expressly warranted and represented the bulk of the gutta percha to be equal to the samples, and that subsequently it was discovered that 98 baskets marked “ X X ” proved to be a certain foreign substance having no marketable or other value whatever and possessing none of the qualities of gutta percha, and in no respect corresponding to the alleged samples ; and a counterclaim of \$994.78 damages was set up resulting from the loss of profits upon a contemplated sale which defendant alleges the plaintiff knew of at the time of the purchase. The reply of the plaintiff admitted that the defendant received samples of the merchandise, but alleged that they were taken by the defendant himself from the bulk of the gutta percha in warehouse, and that defendant personally inspected and had the opportunity to inspect the whole of said gutta percha, and after such inspection took such samples as he chose ; and denied that plaintiff made any warranty or representation, and denied that any part of the gutta percha proved to be a foreign substance having no marketable or other value ; and, whilst admitting that the plaintiff supposed defendant bought the gutta percha for the purpose of reselling the same, denied that plaintiff knew to whom or for what price defendant expected to sell.

George M. Pinney, for appellant.

Frank E. Blackwell, for respondent.

J. F. DALY, Ch. J.—[After stating the facts as above.]—

Curtis v. Soltau.

Upon the trial of the action the defendant offered evidence of conversations with the plaintiff at and before the sale and letters of the plaintiff written before the sale, to prove that the sale was by sample, and also that the plaintiff at the time of the execution of the written memorandum warranted that the gutta percha was of the same quality as the samples; and also offered evidence to show that the 98 baskets rejected were not gutta percha within the meaning of the contract and were not merchantable, and that he had no opportunity for inspecting the goods which he purchased. This evidence was excluded.

There was no written contract of sale on the part of the plaintiff. The memorandum in evidence was signed by the defendant only and purports to contain his obligation and no more. It cannot be said to be the contract between the parties. Not having been signed by the plaintiff it was not in any sense his contract. He could not have been sued upon it and, so far as he was concerned, his agreement rested solely in parol. Under these circumstances, as the agreement of sale had been executed and no question of the statute of frauds can be raised, the defendant should have been permitted to show by parol what the contract of the plaintiff was. Since the trial of this action the precise point has been decided in *Routledge v. Worthington Co.* (119 N. Y. 592). In that case, which was an action to recover payment for certain goods sold by the plaintiffs to the defendant, the plaintiffs produced in evidence a writing signed by the defendant by which it agreed to take them at a price specified. Defendant set up a counterclaim and offered to prove by parol evidence that plaintiffs agreed, in consideration of the purchase and as a part of the agreement, that the trade price at which they sold the goods should not be lowered, and damages were claimed for a breach of that agreement. The testimony was objected to and excluded. This was held error: that the writing represented a part only of the contract, that is, the defendant's undertaking, while that of the plaintiffs rested simply in parol; that there was in fact no valid contract between the parties, but, as it had been executed, this took the agreement

Curtis v. Soltau.

out of the statute of frauds and left the parties subject to and bound by the terms of the actual agreement made; citing *Lockett v. Nicklin* (2 Exch. 93), which was an action of debt for goods sold and delivered, the goods being furnished upon a written order of the defendant, and the defendant offering parol evidence to prove that the terms upon which the order was given was six months credit, etc.; the evidence was held admissible to show the whole contract, of which the paper contained only one of the terms. The rule is stated in the Court of Appeals opinion as follows: "The rule which rejects parol evidence when offered with respect to a contract between parties and put into writing, has no application to a case like this, where, of the original agreement which has been executed, a part only is in writing and the rest was verbal. The principle of liability is the same whether the whole transaction be embodied in one instrument setting forth the respective obligations of both parties, or whether it takes the form of a separate undertaking by each party. Whether we regard the writing of the defendant as an order or as an agreement is quite immaterial. In either view it was an admission only of the defendant's engagement."

In the light of this decision, the exclusion of the testimony offered by the defendant of the agreement made by the plaintiff was error, and the judgment must be reversed and a new trial ordered, with costs to abide the event.

BISCHOFF and PRYOR, JJ., concurred.

Judgment and order reversed and new trial ordered, with costs to abide event.

Tocci v. Arata.

FELICE TOCCI, Respondent, *against* PIETRO ARATA *et al.*,
Appellants.

(Decided January 5th, 1891.)

A writing signed by one only of the parties to an agreement, and purporting to contain his obligation only, not undertaking to bind the other party, is merely an admission of the engagement of the party signing it, and does not preclude him from showing by parol what was the undertaking on the part of the other party.

A writing purporting to express an agreement on the part of plaintiff to advertise a book which defendants were about to publish, and stating the compensation therefor, was signed on behalf of plaintiff and delivered to defendants by plaintiff's agent, but was not signed by defendants and did not purport to bind them. *Held*, that, in an action by plaintiff against defendants for breach of the contract, parol evidence was admissible for plaintiff to prove the terms of the undertaking of defendants, upon the faith of which plaintiff agreed as in the writing indicated.

APPEAL from a judgment of the District Court in the City of New York for the Second Judicial District.

The facts are stated in the opinion.

Hyland & Zabriskie, for appellants.

Scott Lord, for respondent.

BISCHOFF, J.—Plaintiff, being the proprietor and publisher of two newspapers called respectively “Eco D’Italia” and the “Revista,” and the defendants, as copartners, being about to publish a book called the “Giude,” in the month of April, 1889, after some preliminary negotiations, entered into a contract whereby the plaintiff agreed to advertise the publication of the “Giude” in his newspapers, payment for which advertisement was to be made by the defendants by an advertisement of the plaintiff's business to be inserted in the “Giude” and the gratuitous delivery to the plaintiff of five hundred copies of the defendants' publication.

Tocci v. Arata.

The following writing purporting to express the plaintiff's engagement was signed and delivered by his authorized agent to the defendants.

“April 10, Memorandum.

“Mr. Tocci agrees to insert in the ‘Eco,’ daily, and in the ‘Revista Italo Americana,’ an advertisement, reclame, to occupy half a column in the first page, to last and continue until publication of the ‘Giude.’ In compensation Mr. Arata will insert a top adv. in the ‘Giude Generale Italiana’ and fifteen pages of Tocci advertisements in the same ‘Giude,’ and give five hundred copies of the same gratis, to be sent by Tocci to his clients in Italy.

(Signed)

“FELICE TOCCI,
per M. CREVELLI.”

Upon the trial the justice permitted the plaintiff against the objection of defendants' counsel to introduce parol evidence of the terms of defendants' engagement, upon the faith of which the plaintiff agreed as indicated in the writing hereinbefore set forth, and defendants' exceptions to this ruling upon the trial present the only alleged errors which the record of this case calls upon us to consider. It is apparent from that record that if this parol evidence was properly admitted then the only question to be disposed of in the trial court was whether or not the parties to this action had performed their respective engagements, the plaintiff insisting that he had furnished the requisite advertisements to entitle him to the delivery of the promised five hundred copies of the Giude, and the defendants on the other hand claiming that the plaintiff had not advertised the Giude as agreed and that he was not, for that reason, entitled to the delivery of such five hundred copies; and thus the question of the defendants' liability in this action was one purely of fact, which it was the province of the jury to determine, and with which an appellate court should not interfere.

Wise v. Rosenblatt.

We do not think the parol evidence complained of on this appeal was improperly admitted. The writing was signed on behalf of the plaintiff only and did not undertake to bind the defendants. In such a case, it has been held by the Court of Appeals, that the writing, while it may be *prima facie* evidence of the engagement of the party signing, does not preclude him from showing by parol what the undertaking of the party not signing was, and upon the faith of which undertaking the party signing agreed as in the writing indicated (See *Routledge v. Worthington Co.*, 119 N. Y. 592).

The same point is also fully considered in *Curtis v. Soltau*, just decided by the General Term of this court, and the opinion in which is about to be announced (*ante*, p. 490). The cases cited determine the question presented on this appeal adversely to the appellants herein.

The judgment should be affirmed, with costs.

BOOKSTAVEN, J., concurred.

Judgment affirmed, with costs.

LEOPOLD WISE *et al.*, Appellants, *against* WILLIAM ROSENBLATT, Respondent.

(Decided January 5th, 1891.)

A writing signed by one only of the parties to an agreement, and purporting to contain his obligation only, not undertaking to bind the other party, is merely an admission of the engagement of the party signing it, and does not preclude him from showing by parol what was the undertaking on the part of the other party.

Receipts signed by defendant and delivered by him to plaintiffs, for advances by them to him on goods which he had consigned to them for sale, acknowledged that the money was received from plaintiffs "on account of all goods consigned to them; the same to be sold at their discretion, without limit as to time or price." *Held*, that, in an action by plaintiffs against defendant for a balance of such advances exceeding the proceeds of the sales, parol evidence was admissible for defendant to prove a guaranty by plaintiffs to defendant, as part of the agreement for consignment, that the goods would on a sale realize not less than a certain price.

The facts are stated in the opinion.

Henry Steinert, for respondent.

" March 20th, 1889.

§ (Signed) "W.M. ROSENBLATT."

32

Wise v. Rosenblatt.

the consignment of the merchandise by the defendant to the plaintiffs, the latter, as part and parcel of such agreement, had entered into a guaranty with the defendant that the shoes would on a sale realize not less than \$1.25 per pair. And the principal contention on the trial was as to the admissibility of the oral testimony introduced by the defendant, and allowed by the trial justice against the objection and exception of plaintiffs' counsel, tending to establish the fact of the alleged guaranty. If this oral testimony was properly admitted it sufficiently established the guaranty, and the trial justice being authorized to determine the facts, no jury trial having been demanded, it was competent for him to accept the testimony of defendant's witnesses, and upon a mere conflict of testimony in that respect the appellate court will not interfere.

Upon the first appeal herein (9 N. Y. Supp. 500), it appeared that the justice in the court below had rendered a judgment in favor of defendant without allowing him for the counterclaim demanded, and which did not appear to have been withdrawn. There was an apparent inconsistency in this. On the uncontroverted proof, in support of their claim for the balance of the advances made, the plaintiffs were entitled to judgment, unless the defendant had shown himself entitled to the amount of his counterclaim. And as the justice had not determined the counterclaim in defendant's favor he could not fail to award judgment to the plaintiffs for the amount, which, but for the counterclaim, so far as could be ascertained from the record of the appeal, was concededly due. To obviate this inconsistency the judgment was reversed and a new trial ordered. The parties thereupon again appeared in the court below, and for the purposes of a re-trial submitted the evidence taken upon the former trial to the justice for his determination. Upon this second trial the justice found for the defendant for the full amount of his counterclaim, and we are thus for the first time enabled fairly to consider the sufficiency of the evidence in support of the judgment. It is contended by counsel for the appellants that the receipts signed and delivered by the defendant at the

Wise v. Rosenblatt.

time of the advances to him, in so far as they are expressive of the terms upon which the consignment was made, are not open to contradiction by parol evidence, and for the purposes of this appeal, as an abstract proposition of law, this contention may be conceded to be well founded. But the defendant is not precluded because of these receipts from showing the terms of the plaintiffs' agreement and the nature and extent of their undertaking. These receipts, being subscribed by the defendant only, cannot be said to constitute the agreement between the parties to this action. They are unquestionably evidence of what the defendant agreed to do, but they fail to show what the plaintiffs undertook to do, in consideration of the defendant's promise. A mere unilateral engagement is not a contract.

"A. agrees to work for B. for wages. What A. says is a promise so far as concerns himself, and a consideration so far as concerns B.; what B. says is a promise so far as concerns himself, and a consideration so far as concerns A." (Wharton on Contracts, § 493). In just such a case as the one at bar, the Court of Appeals, in considering the question, whether or not a memorandum subscribed by only one of the parties to the agreement can be said to constitute the sole evidence of the contract, to the exclusion of parol evidence of what the engagement of the party not signing was, says, "We think the instrument cannot be so construed. It acknowledges an order for certain articles, a period of delivery and a price. It is an admission of these things by the party signing it, and not at all the contract of both—a mere memorandum to show what had been ordered, that one party might know what they were to supply, and the other what they were to receive, and so avoid a double order. . . . But even an agreement may be valid, although only a part is in writing, and while as to that part the writing is conclusive, parol evidence may be used to show the rest (*Chapin v. Dobson*, 78 N. Y. 74). We think, therefore, no error was committed by the trial court in receiving the parol testimony, and under it and the verdict of the jury, an express warranty as to the quality of the goods agreed to be furnished, must

Wise v. Rosenblatt.

be deemed established" (*Brigg v. Hilton*, 99 N. Y. 517). And in *Routledge v. Worthington Co.*, (119 N. Y. 592), GRAY, J., in the consideration of the same question, says: "In respect to this particular transaction, it was perfectly competent for the defendant to prove a separate and distinct undertaking of the plaintiffs with it, that they would not affect its trade by reducing the trade price. . . . The cases of *Chapin v. Dobson* (78 N. Y. 74), *Van Brunt v. Day* (81 N. Y. 251), and *Brigg v. Hilton* (99 N. Y. 517), fully sustain the proposition that in such a case as this, where the agreement of the plaintiff rested in parol, it is open to proof. The rule which rejects parol evidence, when offered with respect to a contract between parties and put into writing, has no application to a case like this, where, of the original agreement which has been executed, a part only is in writing and the rest is verbal. The principle of liability is the same, whether the whole transaction be embodied in one written instrument, setting forth the respective obligations of both parties, or whether it takes the form of a separate undertaking by each party. Whether we regard the writing of the defendant as an order or as an agreement, is quite immaterial. In either view, it was an admission only of the defendant's engagement."

The point raised by the appellant's counsel on the appeal in this case is also fully considered in the case of *Curtis v. Soltau*, decided by the General Term of this court for November, 1890, the opinion in which is about to be announced (*Ante*, p. 490). The last mentioned opinion is also to the effect that parol evidence of the engagement of the party not subscribing the memorandum is admissible. It follows, that while the defendant could not have been permitted to contradict or vary the terms of his own engagement so far as they have been reduced to writing and subscribed by him, he is not precluded from showing by parol what the plaintiffs promised to do in consideration of his engagement, and inasmuch as it does not appear that the plaintiffs' engagement was also reduced to writing and properly subscribed, it necessarily follows that resort must be had to

Lawrence v. Metropolitan El. R. Co.

parol evidence to ascertain the terms of the agreement on plaintiffs' behalf. The guaranty claimed by the defendant to have been made by the plaintiffs was substantially "if these goods upon a sale thereof fail to realize \$1.25 per pair, we will be answerable to you for the difference between that amount and the price obtained."

This is not in conflict with the defendant's engagement that plaintiffs may sell the shoes without limit as to price, and the promise of the plaintiffs to be answerable to the defendant for the difference between the amount actually realized on a sale, and \$1.25 per pair, may in all probability have been made with a view of inducing the defendant to entrust the plaintiffs with the sale, the plaintiffs entertaining, for the time being, the opinion that the goods would not upon a sale realize less than the amount stated.

For the reasons above stated we cannot predicate any error on the part of the trial justice in allowing parol evidence to be given on defendant's behalf of the plaintiffs' guaranty.

The judgment should be affirmed, with costs.

BOOKSTAVEN, J., concurred.

Judgment affirmed, with costs.

FRANCIS C. LAWRENCE, Respondent, *against* THE METROPOLITAN ELEVATED RAILWAY COMPANY *et al.*, Appellants.

(Decided January 5th, 1891.)

In an action to restrain defendants from maintaining and operating their elevated railway along the street in front of premises belonging to plaintiff, the judgment for plaintiff awarded an injunction, with a condition that it should be inoperative upon payment by defendants of a certain sum as damages to the fee from the maintenance of the railroad, and also awarded damages for past injury. *Held*, that error at the trial, in admitting proof of an offer for the property, as evidence of the value of the fee, was not

Lawrence v. Metropolitan El. R. Co.

ground for reversal, either as affecting the award of past damages, since that was merely incidental to relief by injunction, or as affecting the amount to be paid in avoidance of the injunction, since that condition was not open to attack by defendants, whether they should reject or accept it; the amount to be paid not being so extravagant as to authorize interference to redress an abuse of discretion.

A suspension of the operation of such injunction should not be granted to defendants, upon the acquisition of the property by them by condemnation proceedings, either as a matter of right, or as supported by any equity, under the circumstances; they having for ten years intruded on plaintiff's property without effort, by any legal method, to acquire it.

APPEAL from a judgment of this court entered upon the decision of the judge on a trial by the court without a jury.

The facts are stated in the opinion.

Julien T. Davies and *Brainerd Tolles*, for appellants.

Henry A. Foster, for respondent.

PRYOR, J.—Appeal from a judgment in equity awarding an injunction and damages for injury to plaintiff's property.

The action is to restrain the maintenance and operation of defendant's railroad in the highway fronting plaintiff's property; and, as incidental relief, for the loss already sustained by plaintiff from the depreciation in the rental value of that property occasioned by the presence and operation of defendant's railroad.

The chief error alleged as ground for the reversal of the judgment is, the admission of incompetent evidence; namely, proof of an offer for the property as evidence of its fee value.

In our view, upon the assumption of the incompetency of the evidence, its admission is inoperative to affect the validity of the judgment.

The basis of the action is a right to injunctive relief; and the recovery of past damages is merely incidental, and is allowable only for the purposes of complete justice; upon the principle that when equity legitimately acquires jurisdiction, it will proceed to dispose of the entire controversy (*Hender-*

Lawrence v. Metropolitan El. R. Co.

son v. Railroad Co., 78 N. Y. 423; *Shepard v. Railroad Co.* 117 N. Y. 442). "The court having gained jurisdiction for the purpose of restraining the defendant, it was proper to award damages for the injuries sustained before the commencement of the action" (*Fox v. Fitzsimmons*, 29 Hun 574, 578). It results that if no ground of equitable relief be established—here, a right to an injunction—plaintiff cannot have an award of damages, but the action must be dismissed (*Bradley v. Aldrich*, 40 N. Y. 504; *Wheelock v. Lee*, 74 N. Y. 495; *Arnold v. Angel*, 62 N. Y. 508; *Beck v. Allison*, 56 N. Y. 366).

Still more obvious and indisputable is it, that a right to recover compensation for the value of the fee is not a constituent of the cause of action exhibited by the complaint.

The judgment imposes no obligation on defendants to pay plaintiff the value of the fee. Indeed, a judgment purporting to impose such obligation, would be a legal solecism: for such a judgment involves the concession that damages afford a complete reparation to plaintiff; but equity is ousted of jurisdiction the moment it appears that money is an adequate remedy for the wrong. Then, too, in legal effect the injunction stops the injury; but an award of damages for the fee proceeds upon the hypothesis that the injury is to continue in perpetuity.

Again: upon the supposition that the award of damages for the fee is intended as compensation for the taking of plaintiff's property by defendant railroad company—and such award can be for no other purpose—we are confronted by the fact that the constitution of the state (art. 1 § 7) has prescribed another tribunal for the ascertainment of the amount to be paid for property taken for public use; and so a court of equity has no jurisdiction of the subject (*Hilton v. Bender*, 69 N. Y. 76, 86; *Menges v. City*, 56 N. Y. 374).

It follows, therefore, that when the court proceeded to inquire as to the value of plaintiff's fee taken by defendant, it was not engaged in the determination of any issue in the action—the sole issue being as to the right to an injunction—nor in administering any relief legally comprehended within

Lawrence v. Metropolitan El. R. Co.

the scope of the action as a suit in equity—such incidental relief being only an award of damages for past injuries. But the true theory of the case is this: that, having determined plaintiff's right to an injunction restraining the maintenance of defendant's railroad, the court, as a favor to defendant, proceeded to couple its injunction with a condition: namely, that if defendant would pay plaintiff a certain sum, then the operation of the injunction should be arrested. There was no compulsion upon the court to proffer defendant this alternative; but it would have satisfied all the legal exigencies of the action by the issuance of an absolute injunction. On the other hand, defendant is under no obligation to accept the alternative; but is perfectly free to reject the condition (*Bartlett v. Stinton*, L. R. 1 C. P. 483, 484; *Henderson v. Railroad Co.*, 78 N. Y. 423, 430; *Carter v. Railroad Co.*, 28 N. Y. St. Rep'r 582; *Eno v. Metropolitan R. Co.*, 56 N. Y. Super. Ct. 313; *New York Nat. Ex. Bank v. Metropolitan R. Co.*, 53 N. Y. Super. Ct. 611, 108 N. Y. 660; *Welsh v. Metropolitan R. Co.*, 8 N. Y. Supp. 492). Hence this dilemma: namely, should the defendant reject the invitation to pay plaintiff the value of his fee, then manifestly no injury ensues to defendant from any error in ascertaining the amount of that value; or, should the defendant accept the offer as a condition of escape from the injunction, then, by all authorities, he is precluded to challenge that condition (*Carll v. Oakley*, 97 N. Y. 633; *Radway v. Graham*, 4 Abb. Pr. 468 (Com. Pleas); *Smith v. Rathburn*, 75 N. Y. 122; *Murphy v. Spaulding*, 46 N. Y. 559; *Knapp v. Brown*, 45 N. Y. 210; *Genet v. Davenport*, 59 N. Y. 648; *Wallace v. Castle*, 68 N. Y. 375; *Bennett v. Van Syckel*, 18 N. Y. 481; *Marvin v. Marvin*, 11 Abb. N. S. 97; *Chapin v. Foster*, 101 N. Y. 1; *Dumbman v. Schulting*, 6 Hun 29; *Clafin v. Frenkel*, 29 Hun 288; *Platz v. City*, 8 Abb. N. Cas. 392).

Whether defendant reject or accept the condition, i. e., payment of the fee value to arrest the injunction, he cannot attack the condition, for another reason: namely, that it was propounded by the court as a favor and in the exercise of its discretion (*Smith v. Dodd*, 4 E. D. Smith 643; *Matter of*

Lawrence v. Metropolitan El. R. Co.

Bradner, 87 N. Y. 171, 177, where it is said, "having submitted himself to the discretion of the court, he cannot complain of the manner of its exercise;" *Chapin v. Foster*, 101 N. Y. 1; *Vibbard v. Roderick*, 51 Barb. 616; *Matter of Tyng*, 17 Week. Dig. 234; *Buffalo Ferry Co. v. Allen*, 12 Civ. Pro. 64; *Bartlett v. Stinton*, L. R. 1 C. P. 484).

The conclusion is, that since the alleged error infects no element of the judgment, it is inoperative to impair the validity of the judgment.

It is proper, however, to add that, in our opinion, the sum awarded plaintiff for the value of the fee, is not so extravagant as, on review by the General Term, would authorize an inference of an abuse of discretion by the court below.

Appellant contends further, that the error in the admission of the evidence affects the judgment for damages from depreciation of the rental value of the property. But the error, if any, was plainly of no prejudice to the defendant; because, first, the effect of the evidence in proof of rental value was extremely faint and remote; secondly, the depreciation of rental value was substantially the same upon the evidence of both parties; thirdly, where any discrepancy appears, the plaintiff's estimate is supported by proof of the rent actually received; and fourthly, the sum allowed for depreciation of rental value is less than is shown by the evidence.

An obvious corollary from the proposition that the condition of defeasance attached to the injunction was purely gratuitous and discretionary is, that the defendant could not, of right, demand that the operation of the injunction should be suspended upon the acquisition of the property in controversy by a condemnation proceeding. Nor, had the application for such suspension been addressed to the favor of the court, would it have been supported by any apparent equity—seeing that for ten years defendant has been an intruder upon plaintiff's property, and yet has made no effort, by a legal method, to acquire the property it has so long and so lawlessly appropriated.

In the remaining allegations of error urged by appellants,

Doyle v. Manhattan R. Co.

we perceive none of sufficient gravity to require a reversal of the judgment; and, accordingly, it must be affirmed, with costs.

J. F. DALY, Ch. J., and BISCHOFF, J., concurred.

Judgment affirmed, with costs.

ANNA MARIA DOYLE, Respondent, *against* THE MANHATTAN RAILWAY COMPANY *et al.*, Appellants.

(Decided January 5th, 1891.)

In an action to restrain defendants from maintaining and operating their elevated railway along the street in front of premises belonging to plaintiff, the judgment for plaintiff awarded an injunction, with a condition that it should be inoperative upon payment by defendants of a certain sum as damages to the fee from the maintenance of the railroad, and also awarded damages for past injury. *Held*, that errors at the trial, in the admission and exclusion of evidence of the value of the fee, were not ground for reversal, as affecting the amount to be paid in avoidance of the injunction, since they did not invalidate plaintiff's claim to relief by injunction; the amount to be paid not being so exorbitant as to authorize interference to redress an abuse of discretion.

The construction and operation of such a railway in violation of plaintiff's easements in the highway is a continuing nuisance, for which the owner may recover damages accruing within the six years period of limitation, though the railroad was constructed and operated before that period.

Leases of plaintiff's property, made after the construction of defendants' railway, and terminated before the action, will not prevent a recovery therein by him, under section 1665 of the Code of Civil Procedure, providing that "a person seized of an estate in remainder or reversion may maintain an action founded upon an injury done to the inheritance, notwithstanding any intervening estate for life or for years."

APPEAL from a judgment of this court entered upon the decision of the judge on a trial by the court without a jury.

The facts are stated in the opinion.

Julien T. Davies and *Brainerd Tolles*, for appellants.

W. G. Peckham, for respondent.

Doyle v. Manhattan R. Co.

PRYOR, J.—Action for injunction to restrain the maintenance and operation of defendants' railway and for damages for past injuries. Appeal from judgment awarding such injunction and damages.

The allegations upon which appellants mainly rely, are in the admission and exclusion of evidence as to the fee value of the property in question, and so they affect the amount defendants have the option of paying in avoidance of the injunction. But, such errors, unless they invalidate plaintiff's claim to injunctive relief, are ineffectual to reverse the judgment (*Lawrence v. Metropolitan El. R. Co.*, now decided, *ante* p. 501); and we are of opinion, that upon the unchallenged and uncontroverted evidence, the right to an injunction is clear and incontestable.

It is equally plain that the sum, payment of which is offered defendants as an alternative of the injunction, is not so exorbitant as to call for revision by the General Term in the exercise of its power to redress an abuse of discretion below.

The question, then, is—does any error invalidate the judgment for damages? The errors, if any, in the admission or exclusion of evidence as to past damages, are immaterial and harmless; for the reason that the unchallenged and uncontroverted proof clearly justifies the amount awarded for such damages.

But appellants contend that acts barred by the statute of limitations, are made the basis of recovery. Not so, however. The ground of the action is a taking of plaintiff's property without compensation (*Story v. Railroad Co.*, 90 N. Y. 122; *Lahr v. Railroad Co.*, 104 N. Y. 268). The construction and operation of defendants' railway in violation of plaintiff's easements in the highway, is "a continuing nuisance;" and every continuance of a nuisance is a fresh nuisance, for which a new action may be brought (*Uline v. Railroad Co.*, 101 N. Y. 98, 109 *et seq.*).

The leases of plaintiff's property were all made after the construction of defendants' railway; and all terminated before the commencement of the action; and so, at the time of the

Biggart v. Manhattan R. Co.

injury, possession was in plaintiff. But, by express provision of the Code (§ 1665), "a person seized of an estate in remainder or reversion, may maintain an action founded upon an injury done to the inheritance, notwithstanding any intervening estate for life or for years." The claim is for an injury to the inheritance—the depreciation of its value—but no recovery can be had of past damages for such injury beyond a period of six years. Here the trial judge expressly ruled that no damages should be allowed except as accruing within the six years.

The judgment should be affirmed, with costs.

J. F. DALY, Ch. J., and BISCHOFF, J., concurred.

Judgment affirmed, with costs.

ROBERT BIGGART, Respondent, *against* THE MANHATTAN RAILWAY COMPANY *et al.*, Appellants.

(Decided January 5th, 1891.)

In an action to restrain defendants from maintaining and operating their elevated railway along the street in front of premises belonging to plaintiff, the judgment for plaintiff awarded an injunction, with a condition that it should be inoperative upon payment by defendants of a certain sum as damages to the fee from the maintenance of the railroad, and also awarded damages for past injury. *Held*, that the refusal of the referees by whom the action was tried to find, as a conclusion of law, that plaintiff was not entitled to recover damages for deterioration of the neighborhood caused by the construction and operation of defendants' road, even if error, was not ground for reversal, either as affecting the amount to be paid in avoidance of the injunction, or as affecting the award of past damages, since it would not be assumed that anything was allowed for such deterioration, as a substantive ground of recovery, no claim therefor having been made by plaintiff.

APPEAL from a judgment of this court entered upon the report of three referees.

The facts are stated in the opinion.

Biggart v. Manhattan R. Co.

Julien T. Davies and *Brainerd Tolles*, for appellants.

Henry A. Foster, for respondent.

· PRYOR, J.—Appeal from a judgment of injunction and for damages. Action to restrain the maintenance and operation of defendants' railway along the highway in front of plaintiff's premises, and to recover for past injuries to plaintiff's property from the presence and operation of said railway.

The single error urged in impeachment of the judgment is, the refusal of the referees by whom the case was tried, to find, as a conclusion of law, that "plaintiff is not entitled to recover damages for deterioration of the neighborhood caused by the construction and operation of defendants' road." So far as this refusal may be supposed to affect the amount to be paid by defendants in avoidance of the injunction, if error at all, it is not an error available for reversal of the judgment (*Lawrence v. Metropolitan El. R. Co.*, now decided, *ante* p. 501).

But the refusal of the finding is no error, even in respect of the recovery for past damages.

It is a preposterous assumption that the learned referees allowed anything to plaintiff, as a substantive ground of recovery, for the deterioration of the neighborhood, *i. e.*, for injury to other people's property; and a court cannot, with propriety, be called upon to negative an obviously and indisputably absurd proposition. Besides, the conclusion of law propounded by defendants was utterly irrelevant to any claim of plaintiff apparent in the complaint or presented on the trial; and for that reason alone was properly rejected by the referees. But, that the fact of the deterioration of the neighborhood caused by defendants' railroad, was competent and relevant evidence on the issue as to the deterioration of plaintiff's property, is expressly affirmed in *Drucker's Case* (106 N. Y. 157), where the court say: "to measure and appreciate the individual loss to plaintiff, the nature and extent of the general injury was properly and necessarily considered."

Gray v. Manhattan R. Co.

We see no error in the record, and the judgment must be affirmed.

J. F. DALY, Ch. J., and BISCHOFF, J., concurred.

Judgment affirmed, with costs.

JOHN A. C. GRAY, Respondent, *against* THE MANHATTAN RAILWAY COMPANY *et al.*, Appellants.

(Decided January 5th, 1891.)

In an action to restrain defendants from maintaining and operating their elevated railway along the street in front of premises belonging to plaintiff, no claim being made for past injuries, the judgment for plaintiff awarded an injunction, with a condition that it should be inoperative upon payment by defendants of a certain sum as damages to the fee from the maintenance of the railroad; but on the trial defendants were not allowed to avail themselves of special benefits to plaintiff's property from the maintenance and operation of the railroad and the proximity of its stations, as affecting the estimate of the amount of plaintiff's damages. *Held*, on appeal from the judgment, that as it appeared from the record that such special benefits might have been found to preponderate over the injury, the error in excluding them from consideration affected, not merely the amount to be paid in avoidance of the injunction, but the right to relief by injunction; and the judgment must be reversed.

APPEAL from a judgment of this court entered upon the decision of the judge on a trial by the court without a jury.

The facts are stated in the opinion.

Julien T. Davies and *Samuel Blythe Rogers*, for appellants.

George Putnam Smith, for respondent.

PRYOR, J.—Appeal from a judgment in equity, restraining the maintenance of defendants' railroad along the highway

Gray v. Manhattan R. Co.

in front of plaintiff's premises, situate at the northwest corner of Ninth Avenue and Seventy-seventh Street in the City of New York. The action is for injunctive relief only, no claim being made on account of past injuries. The court awarded the injunction, coupled with a condition that it should be inoperative upon payment by defendants of \$8,000, as damages to the fee from the maintenance of the railroad.

The trial occurred prior to the decision in *Newman v. Railway Co.* (118 N. Y. 618), and at a time when, by the current adjudications of the courts, benefits to property from the presence of the railroad were not allowed to affect the amount of recovery for injuries by the railroad. On the trial defendants endeavored, but endeavored in vain, to avail themselves of those benefits in mitigation of those injuries. Thus, they proposed the following conclusion of law, which the court refused, and to which refusal they duly excepted: "In estimating the value of plaintiff's easements, if any, the benefits resulting to said premises, and peculiar thereto, from the maintenance and operation of said railway, are entitled to be set off against the inconveniences thereto, resulting from the said maintenance and operation." Again, defendants requested this finding of fact, namely: "The value of the plaintiff's easements, taken, appropriated, or interfered with, and resulting from the perpetual maintenance and operation of the defendants' railway, over and above the said benefits resulting therefrom to the said premises and peculiar thereto, is the sum of _____ dollars." This request was likewise refused, and to the refusal exception was duly taken.

Nay, more: in its findings of fact, (seventeenth), the court implicitly excluded any and all allowance for benefits from its estimate of damages to the property; and to this ruling again, defendants took the appropriate exception.

Thus, by every legal expedient, defendants presented the proposition, that they were entitled to credit for any special and peculiar benefit their railway conferred on the property; and thus the court, by its rulings, refused them any allowance for such benefit. The contention of respondent, that

Gray v. Manhattan R. Co.

notwithstanding this distinct rejection by the court of defendants' claim for benefits, the court is still to be assumed to have allowed them in the computation of its award, is plainly inadmissible; for, *first*, it conflicts with the presumption, prevalent in all forensic proceedings, that error is detrimental, unless the contrary be clearly and conclusively apparent; and *secondly*, if error in a ruling by the court be canceled by a presumption that such error was of no effect in its decision, then obviously the judgment of the court is invulnerable, and the process of appeal an idle and ineffectual formality.

If, however, we concede the presumption for which respondent contends, it would prevail only in the absence of proof that the error of the court was operative in its judgment; but, upon the record before us, the inference is irresistible, that in the award of damages to plaintiff all consideration of benefit to his property was excluded.

By plaintiff's own witnesses, it appears that the property in question has risen from \$24,000, its value before the railroad was built, to \$84,000, its value after the construction and operation of the road. But, it is argued that this enormous enhancement of value is not the effect of those special and peculiar benefits from the road with which defendants may be credited, but is due to that general appreciation of property which accrues to the public generally, and is not, therefore, chargeable against plaintiff in the computation of his damages (*Newman v. Railway Co.*, 118 N. Y. 618). What are the "special and peculiar" benefits to property from the presence of the railroad, which, the Court of Appeals says, must be deducted in the award of damages to plaintiff? Are they such benefits as his property, and his property alone, enjoys from the railroad? If so, then the several owners of two contiguous lots increased in value by the road, would neither be chargeable with benefits, although if the lots of one only were advantaged, the award for his property might be reduced by the benefit possibly to a nominal sum—a palpable *reductio ad absurdum*. But, if two lots may be chargeable with benefits, why not ten, or a

Gray v. Manhattan B. Co.

hundred, or all the lots along the line of the railroad? Plainly, the test is not the number of properties benefited; but the criterion is the relation of the properties to the railroad, and the specific effect of the railroad upon their value. By the express terms of the Court of Appeals decision, the distinction is, between the increase of value, from the growth of public improvements, which "accrues to the public benefit generally" and "the special and peculiar advantages which the property receives from the construction and operation of the road, and the location of the stations." Hence, an increase of value which plaintiff's property enjoys from the railroad in common with the public "generally," is a benefit with which defendants are not to be credited as against the plaintiff; but an increase of value which plaintiff's property derives from the railroad and which is not participated in by the public generally, is a special and peculiar benefit with which the railroad is to be credited, no matter what the number of properties upon which such special and peculiar benefit is bestowed. If the benefit be directly derived from the railroad, either by the proximity of its stations, or the facility of access it affords, and be not shared by the general public, then it is a special and peculiar benefit. Now, it abundantly appears in the case, that the enhancement in value of plaintiff's property, is attributable directly to the proximity of defendants' stations, and to the approach to it by which defendants' railroad rescued it from its former secluded and inaccessible locality. And, that this benefit is "special and peculiar," is demonstrated by the unchallenged proof, that property, in the parallel and adjacent avenues along which the railroad does not run, exhibits nothing of that prodigious rise in value which is so conspicuous in plaintiff's property. Indeed, that plaintiff's property is specially and peculiarly benefited by defendants' railroad, is, in effect, conceded by the trial court, which found "that said premises would not be worth as much as they are, had the said railway and station not been built."

But, that this special and peculiar benefit was not allowed to defendants in the assessment of plaintiff's damages, is

Gray v. Manhattan R. Co.

evident in the fact that, whereas plaintiff's property has increased \$60,000 in value since the railroad, the court awarded him \$8,000 damages from the railroad,—manifestly an impossible result, had any deduction been made on account of benefits from the railroad.

The inquiry, then is, did the court err in its rejection of the proposition of law submitted by the defendants? In other words, was not the amount of award to plaintiff for his property taken by defendants, subject to reduction by an allowance for benefits specially and peculiarly accruing to his property from the presence of defendants' railway? Since the decision of the Newman Case, the question is no longer open, at all events in this court. In that case (118 N. Y. 618), the judge charged the jury that they "had no right to take into consideration any benefit to the premises," and this the Court of Appeals unanimously held to be a fatal error. The court say (p. 625) that "in making an award to a party situated as the plaintiff was with reference to the defendants' railroad" [the relation of this plaintiff to defendants' railroad is identical], "there would be no compensation for property taken beyond a nominal sum, and that his right to recover would rest chiefly upon proof of consequential damages. An estimate of such damages involves an inquiry into the effect of the railroad upon the whole property and a consideration of all its advantages and disadvantages."

Again, the court say (p. 624), that the "commissioners must consider the effect of the road upon the whole of the remainder [of plaintiff's property], its advantages and disadvantages, benefits and injuries; and if the result is beneficial, there is no damage and nothing can be awarded." Still further, criticising the charge below, the court say (pp. 627-628): "If the rule which the court held in this case is to govern awards made against railroad companies whose structures are erected in the public streets under public authority, when no land is taken, and the compensation is confined to injuries sustained by abutting property, the companies will be compelled, in many instances, to pay where no injury has

Welsh v. New York El. R. Co.

been done, and parties will recover who have sustained no loss. Such a rule has not yet received judicial sanction."

Plainly and incontestably, the ruling under review is irreconcilable with the doctrine of the Court of Appeals; and equally certain is it that the ruling would not have been made by the very accurate and careful trial judge, had the decision of the Newman Case been promulgated when he gave judgment in the case before us.

If the refusal of the court to apply the law, as submitted by appellant, merely affected the amount which appellant might pay in avoidance of the injunction, the error would be ineffectual to reverse the judgment; but it goes to the very foundation of the action, and involves the question whether plaintiff be entitled to injunctive relief. For, had the gain to plaintiff's property from the railroad been set off against the loss, we cannot say but that the court would have found that the benefit preponderated over the injury; and so, that no case was shown for an injunction.

Waiving the consideration of appellant's other points, for the error discussed the judgment must be reversed (*Schwinger v. Raymond*, 88 N. Y. 198; Code Civ. Pro. §§ 992, 1028).

BOOKSTAVER and BISCHOFF, JJ., concurred.

Judgment reversed.

CHARLES WELSH, as Executor, etc., of GEORGE W. WELSH,
Deceased, Respondent, *against* THE NEW YORK ELEVATED
RAILROAD COMPANY *et al.*, Appellants.

(Decided January 5th, 1891.)

In an action to restrain defendants from maintaining and operating their elevated railway along the street in front of premises belonging to plaintiff, the judgment for plaintiff awarded an injunction, and also damages for past injury; but on the trial defendants were not allowed to avail themselves of special benefits to plaintiff's property from the proximity of a

Welsh v. New York El. R. Co:

station of the railway, as affecting the estimate of the injury to the rental value and the fee value of the property. *Held*, that the exclusion of all consideration of such benefits in the award of damages was error, for which the judgment must be reversed.

Plaintiff's interest in the premises was a leasehold estate, with a contingent right of renewal. *Held*, that it was error to award him a perpetual injunction; the restraint should be only during the subsistence of plaintiff's interest.

APPEAL from a judgment of this court entered upon the decision of the judge on a trial by the court without a jury.

The facts are stated in the opinion.

Julien T. Davies, Samuel Blythe Rogers, and J. C. Thompson,
for appellants.

G. Willett Van Ness, for respondent.

PRYOR, J.—In this action, for an injunction against defendants' railway and for damages, plaintiff has judgment for an injunction and for \$15,650 damages for past injury. Because of error apparent in the record, the judgment must be reversed.

I. Seeking to avail themselves of the principle afterwards enunciated in *Newman's Case* (118 N. Y. 618), defendants requested the trial court to find conclusions of law, as follows: "In estimating the combined injury done to the rental value of said premises by said railroad in Greenwich Street and railroad station in Barclay Street, the benefits conferred by the said station upon the same should be considered in mitigation of damages." And again: "The increased rental value of said premises due to the benefits conferred by said station upon said premises, should be considered as diminishing *pro tanto* the damage to the rental value of the same." Each of these requests was refused, and to such refusal defendants duly excepted.

Then, the court was requested to find the fact that, "the existence of said station on the said railroad has rendered said premises more accessible to other parts of the City of

Welsh v. New York El. R. Co.

New York than they otherwise would be. 'This has added to the rental and fee value of said premises.' This request also was refused, and to the refusal defendants duly excepted.

Furthermore, defendants offered evidence of special and peculiar benefits to plaintiff's property from the maintenance of defendants' railway and station, but the evidence was excluded, and defendants excepted. The rejection of this evidence is adduced, not as error in itself (it probably was), but as manifesting that, in the judgment of the court, proof of benefit was incompetent to mitigate injury. But, that the court excluded all consideration of benefits in its award for damages to plaintiff's property, is clear beyond controversy, in its suggestion to the witness to leave benefits out in his estimate of injury to rental value. Indeed, upon all the evidence it is impossible to resist the conclusion, were it necessary to invalidate the judgment, that the learned trial judge yielded to the then prevalent doctrine of the court, and eliminated benefits of which there was ample evidence, from his estimate of injury to plaintiff's property.

The opinion in Gray's Case, herewith decided, (*ante* p. 510), renders further discussion of the point superfluous.

II. In any litigation a party's recovery must be on the basis of his interest, and can only be commensurate with his interest. Here, plaintiff's interest in the premises affected, is a leasehold estate terminable 1st July, 1892, but with a contingent right of a renewal for twenty-one years. Yet, the court allowed plaintiff a perpetual injunction, forever restraining the maintenance and operation of defendants' railroad. The restraint should have been only during the subsistence of plaintiff's interest. Upon an extension of his term another injunction might issue (*Welsh v. Railroad Co.*, 8 N. Y. Supp. 492).

Although this error might be obviated by a modification of the judgment, still for the other it must be reversed.

J. F. DALY, Ch. J., and BISCHOFF, J., concurred.

Judgment reversed.

Rich v. New York El. R. Co.

ALEXANDER RICH, Plaintiff, *against* THE NEW YORK ELEVATED RAILROAD COMPANY *et al.*, Defendants.

[SPECIAL TERM.]

(Decided April, 1891.)

The theory on which an action to restrain the maintenance and operation of an elevated railroad above a street may be maintained by an owner of land abutting on the street, is that the continued operation of the road would work a substantial injury to such plaintiff and his property, and that an injunction is necessary to prevent such injury. The primary object of the action is to obtain the relief by injunction; the recovery of past damages is a mere incident, allowable only that complete justice may be done, where plaintiff is entitled to an injunction; and the ascertaining of damage to the fee by reason of future injury is only a matter of favor to the defendant, in order that the injunction may be avoided on payment of the amount so found. In such a case, therefore, the first inquiry must always be whether plaintiff has sustained any injury entitling him to an injunction.

Where such an action is brought for alleged injuries to several lots owned by the plaintiff, all on the same street and within a few blocks of each other, even though they are not contiguous, special benefits peculiar to one of such lots, arising from the operation of the road, may be offset against the injury to the others, in determining whether on the whole plaintiff has sustained or is likely to sustain such injury as would entitle him to an injunction.

Where, upon such consideration and balancing of advantages and injuries to various pieces of property by reason of the operation of defendant's road, it appears that a case of substantial injury requiring equitable interference by injunction is not made out, but the evidence shows that some damage may have been done to certain of the properties embraced in the complaint, and the complaint contains allegations sufficient to entitle plaintiff to recover for such damages in an action at law, instead of dismissing the complaint, the cause may be retained and tried by a jury as an action at law.

TRIAL of an action at the Equity Term.

The action was brought to restrain defendants from maintaining and operating their elevated railroad in the street in front of certain lots owned by plaintiff, and for damages caused thereby.

Rich v. New York El. R. Co.

L. Dessar and Allen L. Smidt, for plaintiff.

Davies, Short & Townsend, for defendants.

BOOKSTAVEN, J.—This is an action in equity to enjoin the maintenance and operation of defendants' railway above the street in front of plaintiff's premises known as Nos. 139, 181, 183, 185, 187 Park Row, and Nos. 20 and 23 Chatham Square, otherwise designated as 233 and 235 Park Row.

The theory on which actions like this are maintained in courts of equity is that the continued operation of defendants' road would work a substantial injury to the plaintiff and his property, and that an injunction is necessary to prevent such injury. The primary object of the action is to obtain this relief by injunction, and not the recovery of past damages, for this is a mere incident to the action, and is allowable only in order that complete justice may be done between the parties, where the plaintiff is entitled to an injunction. Much less is it to ascertain the damage to the fee by reason of future injury to be apprehended, for that is determined, in cases like this, only as a matter of favor to the defendant, and in order that the injunction may be avoided on the payment of the amount so found. (*Lawrence's Case, ante* p. 501).

In cases like the one under consideration, therefore, the first inquiry must always be whether the plaintiff has sustained any injury entitling him to an injunction. In this case, before such inquiry can be made, another question must be determined, and that is, whether or not, in arriving at a conclusion as to the injury, the special benefits peculiar to one piece of property arising from the operation of the road can or should be offset against the injury arising from such operation to other property belonging to the same owner not contiguous to the first, but in the same neighborhood. The *Newman Case* (118 N. Y. 618), announced the doctrine that in determining damages to the easements appurtenant to land abutting on streets through which the elevated roads are maintained and operated, the rule established under the general railroad law must govern awards made under the

Rich v. New York El. R. Co.

rapid transit act, and in estimating damages for the interference with such easements the special and peculiar advantages the abutting property receives from the operation of the railroad and the location of stations must be offset against any injury inflicted. It is true this doctrine was announced in an action at law, but I can see no reason why the rule is not as applicable to suits in equity as to actions at law, and it was so applied by the general term of this court in *Gray's Case* (*ante* p. 510). The latter case also decides that where there are a number of contiguous lots belonging to the same owner specially and peculiarly benefited, the benefit to the whole number must be offset against the injury to all. In the course of the opinion delivered it is said: "Plainly the test is not the number of properties benefited, but the criterion is the relation of the properties to the railroad, and the specific effect of the railroad upon their value." It follows from this that if the various pieces of property mentioned in plaintiff's complaint had been grouped together in one parcel, the benefit to a part must have been set off against the injury to the whole. If the final test is the relation of the properties to the railroad and its effect on the value of all, what does the relation of the various parcels to each other have to do with the question? The road and its operation is the common cause of the special benefit to a part and of injury to the rest. In this case the properties are all on the same street, within a few blocks of each other. The road cannot be operated in front of one unless it is run in front of all the others. The remedy by injunction cannot be granted for the benefit of those injured without at the same time destroying the advantages to those benefited. The plaintiff has the same interest in all. It would therefore seem to be a logical necessity, under the decisions above cited, that the special advantages from the operation of the road, as well as the injuries, should be considered and set against each other, whether the property is contiguous or not, in order to ascertain whether on the whole the plaintiff has sustained, or is likely to sustain, such injury as would entitle him to an injunction. In determining this action it is not

Rich v. New York El. R. Co.

necessary to consider what would have been the result if the lots had been in different neighborhoods, widely separated; nor whether or not the defendant could have set up as a defense the advantages to a lot not set forth in the complaint, as against injuries to those that were, for the plaintiff has chosen to include all in one complaint, and thus to raise this question. It will be time enough to determine the others when they are presented for adjudication.

The inquiry, then, is whether or not the plaintiff has sustained such injury in this case as to entitle him to an injunction. In this consideration lot No. 20 Chatham Square may be left out of the question altogether, as it does not abut on defendants' road, and but little evidence was offered concerning it—none to show it had been injured, and little to show it had received any special advantage. No. 23 Chatham Square was purchased by plaintiff at public auction in 1877 for \$12,550, subject to a lease running to May, 1880, at the yearly rent of \$1,800 per annum. Before the expiration of this term defendant's road had been built, and was in operation; a station had been constructed on Chatham Square, and the stairs leading to it stand immediately in front of the premises in question. It is one of the most active on the line of the road, where a large number of passengers take the cars, and where exchange of passengers for the different lines is made. About the time this lease expired plaintiff made some repairs at a cost of \$4,000, and let the place for \$2,800 annually for the period of three years; then he let it for five years from the 1st of May, 1883, for \$4,500 per annum; and it also rented for that sum in 1888–1889. In 1889 and 1890 he made two leases for \$5,600, or thereabouts. Both tenants, after experimenting with the place, found it unprofitable at that price, and gave up the leases, or were dispossessed. Since then, and probably largely in consequence of the frequent changes, and the time of the year when it was relet, the present rent is only \$3,500, the tenant to make all repairs. But I think it clear from the testimony that during all the time since 1883 those premises have averaged \$4,500 per annum, and with proper management that sum could have been realized

Rich v. New York El. R. Co.

therefrom. If we assume, however, that the annual rental was worth \$4,000 only, then on the basis of 8 per cent., which the experts on both sides say is the fair rental value of property of this kind, the fee of the premises is worth \$50,000; and if we take the present rental at \$3,600, allowing \$100 per annum for repairs, we have a fee value at 8 per cent. of \$45,000. But the property cost the plaintiff less than \$17,000, including repairs, and this would show a rise in value of \$28,000, or more than 160 per cent. on the original cost, due to some cause. What other cause than the operation of the railroad can be assigned for such an enormous increase? In the first place, it may be said with truth that the property was bought at the period of greatest depression following the panic of 1873, although the plaintiff testified, "We had no panic in Chatham Street," and it is true that its effects were less felt in that neighborhood than in many other parts of the town, for the simple reason that it had not been the field of any extraordinary inflation. It is also true that the situation of the premises, commanding, as they do, so many avenues of approach, is exceptionally advantageous, and in consequence they would recover from a depression more rapidly than most properties, and thereafter lead in the rise in value. But allowing for these and all other natural causes tending to increase the value of this property, I do not think that any fair-minded person could say that they had increased the value more than 80 per cent. since 1877; for it must be borne in mind that no large or expensive improvements have been made in this neighborhood for many years. This would leave 80 per cent. of the increase to be attributed to the operation of the railroad, or about \$14,000 to the fee value, and more than \$1,100 to the annual rental value. This result has been arrived at from plaintiff's own figures, without any reference to the testimony of the experts, which must always be received with some caution. Plaintiff's expert fixes the present value of these premises at \$30,000, which is a large increase over their cost; but this figure is not well supported by actual transactions, and would make the rental value 12 per cent., instead of 8 per cent., which he says is the normal relation of

Rich v. New York El. R. Co.

rental to fee value, and there is no adequate cause assigned for this difference.

In arriving at any fair judgment as to the effect of the railroad on the rental and fee value of plaintiff's other property on Park Row, several facts must be considered. The first is that many of the buildings now on that street between Duane and James Streets were erected more than 50 years ago and are but two or three stories high. Plaintiff's buildings, with one exception, are, in the language of his expert, "the old-fashioned kind of cheapest buildings on Chatham Street," which, as another witness says, are in a "very bad state of repair." Besides, no new buildings of any importance have been erected along this street between Duane and James Streets, nor have any extensive improvements been made. Then, too, about the time of the panic, and before there had been any considerable recovery from it, the large carpet, oil cloth, furniture, and other business houses, which up to that time had been in the street, moved out of it to points nearer the new centers established for these respective trades. To all this must be added the fact that for many years that part of Park Row formerly known as Chatham Street had been largely given up to saloons, dance-houses, dives, and other disreputable resorts, and to pawnbrokers and second-hand clothing dealers, usually found in close proximity to such places. When the municipal authorities undertook the regeneration of this district by suppressing these resorts they drove from the owners of the property their most profitable tenants, or at least those who would agree to pay the highest rent, and left on their hands old vacant buildings, dirty and squalid, and not fit for any large or respectable business without considerable outlay of money in altering and rehabilitating them. In order to procure tenants under such circumstances it became necessary for landlords to reduce the rents to such a point as to induce artisans and small traders to move in from other streets. But the evil reputation acquired in former years still clung to the street, and kept honest people from taking up their places of business in it, and it is generally understood that this was the cause which

Rich v. New York El. R. Co.

led the property owners to ask for and the municipal authorities to change the name of the street from Chatham, a name honorable in itself, and having an historical value, to Park Row, which is a misnomer when applied beyond Chambers Street. These considerations will make clear the evidence given in the case as to numbers 139, 181, 183, 185, and 187.

No. 139 Park Row consists of a two and one-half story brick building on a lot 14 feet wide by about 60 feet deep, and, according to plaintiff's own testimony, this lot let for \$2,200 per annum from 1865 to 1870. In 1876 it rented for \$1,800, and in 1878 it had fallen to \$1,400, or a fall altogether of \$800 before defendants' road was built. It now lets for \$1,100 per annum; consequently, if this entire depreciation were charged to the elevated road, it would only amount to \$300 per annum, while plaintiff's expert does not claim the fee value to have depreciated more than \$1,000 or \$2,000, and it is safe to take his lowest figures. This building is in much better repair than any of the others above named. According to the same testimony, in 1870 or thereabouts, he let 181 Park Row for \$2,800 per annum. If this is correct, there was a remarkable falling off in 1871, for from a lease in evidence it appears this property was let from 1871 to 1874 at \$1,600 per annum, and that was before the panic had set in. There is now a lease on the premises at the rate of \$1,400 per annum, although plaintiff claims he only collects \$1,200 from the tenant. His expert does not claim that the depreciation in fee value exceeds \$2,000. The building is of brick, three and one-half stories in height, on a lot 25 feet front by about 46 feet deep. Nos. 183, 185, and 187 are two stories and attic, peaked-roof brick buildings on a lot 35 feet 6 inches in front by about 46 feet deep, the ground floor being divided into three stores, each less than 11 feet wide in the clear. They are situated at the corner of Roosevelt Street and Park Row, and are in a very dilapidated and filthy condition. That the rents have fallen off is not to be wondered at, but that it is all due to the operation of defendants' road cannot be assumed, in view of the facts testified to by the plaintiff and his witnesses concerning 139 and 181. If the fee value of 181,

Blich v. New York El. R. Co.

which is 25 feet by 46 feet, with a building on it three and one-half stories high, has only fallen off \$2,000 by reason of the operation of defendants' road, as testified to by Mr. Curtis, it is inconceivable that these premises, next door to that, and only 35 feet 6 inches by 46 feet, with buildings only two and one-half stories high, and in bad condition, could have depreciated in value from the same cause \$15,000, or even \$13,000, as he testifies. This property is only 10½ feet wide,—that is, less than one-half larger than that; and, if the running of the road operated equally on both properties, (and I see no reason why it should not,) then the depreciation from this cause should have been at most only \$3,000, instead of \$13,000. The fact that the latter property is on a corner should tend to diminish, rather than increase, the damage, as the side street gives free air, light, and access to the property. But 10 per cent. on \$3,000 is only \$300, beyond which the rental value should not have depreciated, were the railroad the only cause of the depreciation in value. And I think defendant's testimony in regard to rents on Pearl and Vandewater Streets, where there is no railroad, but which are in the immediate neighborhood, strongly confirms the view. It will be remembered that the stores Nos. 183, 185, and 187 Park Row are only 12 feet wide, and rent for \$600 each, without any other part of the building. No. 401 Pearl Street is a building on the corner of Vandewater and Pearl Streets, and is 16½ feet wide, and the entire building rents for \$800 a year only; No. 403 Pearl Street is a building 16 feet wide, and the whole building rents for \$450 a year; No. 405 is also 16 feet wide, and it, together with 41 Vandewater Street, after having \$4,000 spent for repairs, rents for \$900 for the whole building, and the buildings 443, 445, 447, and 447½ Pearl Street rent entire for about \$460 each; 451, 453, 455, 457, and 459 Pearl Street, just out of Park Row, rent entire for about \$600 per year, or for what the stores alone in Nos. 183, 185, and 187 Park Row rent for. The Wemple building, in Pearl Street, shows a falling off of \$1,000 per year since 1886 in rent, even after additional attractions costing \$10,000 had been added to the store.

Blich v. New York El. R. Co.

So far I have not referred to the testimony of Mr. Fogg, the defendants' expert, not because I do not think him in all respects as reliable as the plaintiff's experts, but because I preferred to examine the case upon the testimony of the plaintiff only. In fact, I think that Mr. Fogg's testimony is better supported by actual transactions than Mr. Curtis' is. It tends to show that, instead of there being any decrease in fee values on Park Row between Duane and James Streets, there has been a considerable advance, and about the same that has taken place in other localities in the neighborhood not upon the line of the elevated road, and that the figures which I have made for the plaintiff have been liberal towards him. It also shows that the owners of property on Park Row have faith in the future of that street, as comparatively few sales have been made on it since the elevated railroad has been in operation.

The sum of the matter then appears to be that the fee value of No. 139 Park Row has depreciated not more than \$1,000, of No. 181 not more than \$2,000, and of Nos. 183, 185, and 187 not more than \$3,000, or \$6,000 in the aggregate, against which must be offset the \$14,000 peculiar benefit accruing to the premises No. 23 Chatham Square by reason of the operation of defendants' road and the location of the stations; that for the same reason the annual loss in rents has not exceeded \$200 for No. 139 Park Row, nor say \$300 for 181 and \$300 in all for Nos. 183, 185, and 187, or \$800 in the aggregate against which must be offset the \$1,100 appreciation in rent, which I think is due to special advantages arising from the running of the road. In my judgment, therefore, the plaintiff has failed to sustain the burden he assumed when he tendered the issues in this action, and has failed to show that on all the property as a whole and the whole case he has sustained a substantial injury which would authorize the court to grant an injunction, and it should never be granted merely to coerce an adjustment of differences between the parties.

Under this state of fact, defendants' counsel insists that the complaint should be dismissed, and cites in support of this

Rich v. New York El. R. Co.

contention *Brush v. Railway Co.* (18 N. Y. Supp. 908), but in that case the learned judge who tried it found as a fact that the plaintiff therein had sustained no damage whatever, while in this case, I have only found that, upon a consideration and balancing of the advantages and injuries to various pieces of property by reason of the operation of defendants' road, the plaintiff has not made out a case of substantial injury requiring the equitable interference of the court by injunction,—not that the operation of defendants' road has not injured plaintiff in any way or to any amount; on the contrary, I think the evidence shows that some damage has been done to certain of the properties embraced in the complaint. At least the testimony leaves fair room for discussion and difference of opinion upon that subject. And because the plaintiff has mistaken his remedy, I do not think he should be prevented from recovering for the injuries he has actually sustained, especially as the complaint contains sufficient allegations to entitle him to recover for such damages in an action at law. In *Davis v. Morris* (36 N. Y. 569), it was said that, should the plaintiff fail to show himself entitled to any equitable relief, but should show a right to legal relief, the judge should not dismiss the complaint, but still order the case to be tried by the jury as an action at law, which I accordingly do in this case upon the payment by the plaintiff to the defendants of the costs and disbursements of this trial, and making his election so to do within 20 days after being required to do so by the defendants or their attorneys, and, if he fails to make such election within said time, then the complaint should be dismissed, with costs.

Order accordingly.

Floyd v. Clark.

ELIZABETH F. FLOYD, Administratrix, etc., of David Van Horne Floyd, Deceased, Plaintiff, *against* EDWIN CLARK *et al.*, Defendants.

[SPECIAL TERM.]

(Decided February, 1880.)

As the provision of the Code limiting the lien of a judgment on real estate to ten years (Code Civ. Pro. § 1251) makes no distinction between lands still owned by the judgment debtor and lands conveyed to others or incumbered by other liens, judgments over ten years old are not liens on surplus moneys arising on a foreclosure sale of land of the judgment debtor. The provision for levying execution on the debtor's real estate after ten years (Code Civ. Pro. § 1252) does not extend the original lien of the judgment.

Upon distribution of surplus moneys arising on a foreclosure sale of land, a claim by an attorney to a certain sum as payable for his professional services out of a judgment which is a lien on the land, may properly be left to be enforced by action.

The costs to be allowed on the proceeding to determine the disposition of such surplus moneys are motion costs and disbursements only.

MOTION to confirm report of referee as to distribution of surplus moneys arising on a sale of land upon foreclosure of a mortgage.

J. F. DALY, J.—Judgments over ten years old are not liens on the surplus. They are not liens on the real estate of the judgment debtor. The Code (§ 1251) limits the lien on real estate to ten years, without making any distinction between lands still held by the debtor and lands conveyed to others or incumbered by other liens. Before the passage of this Code the judgment bound the real property of the debtor, where no other rights intervened, for the full twenty years, and such property might be sold upon execution at any time during that period (2 Rev. Stat. 539 §§ 3 and 4; *Nims v. Sabine*, 44 How. Pr. 252; *Beard v. Sinnott*, 3 Jones & S. 51). The provision of the Revised Statutes cited has been repealed by chapter 417, Laws of 1877. Execution may now be levied

De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.

on the debtor's real estate after ten years under the provisions of section 1252 of the Code. But this special provision does not extend the original lien of the judgment, and the real estate is bound only from the time of recording and indexing the notice therein provided for. No such notice was recorded in this case, and the judgments obtained against Garrett D. Clark, on October 14th, 1861, May 4th, 1862, February 12th, 1864, and August 15th, 1865, were properly excluded by the referee.

The referee does not allow the claim of D. Levy for payment of \$50 to him as attorney of Mrs. Corcoran, payable out of the amount of her judgment. I think it better to leave him to his action for whatever may be due him for services as attorney and counsel.

The costs to be allowed on this proceeding are motion costs and disbursements only: \$20 costs each to Cooper and Roe and Thomas & Wilder.

Order accordingly.

THE DE WITT WIRE-CLOTH COMPANY, Plaintiff, *against*
THE NEW JERSEY WIRE-CLOTH COMPANY, Defendant.

[SPECIAL TERM.]

(Decided February, 1891.)

Several manufacturers of wire-cloth entered into an agreement for the avowed object of regulating the price of that commodity, whereby they constituted themselves an association, and engaged not to sell at less than certain specified prices, under a heavy penalty, the amount of which was deposited by each of the members, to be forfeited upon a violation by such member of the obligation, and to be divided equally among the other members, such violation to be determined and forfeiture declared by the association. *Held*, that the agreement was void as against public policy, both because it tended to restrict competition in trade and to arbitrarily enhance the

De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.

price of a commodity of commerce, and because it created the association a tribunal to adjudicate upon alleged violations of its own rules and to decree forfeitures therefor, constituted of the persons who would benefit by the forfeiture; and the courts would not aid one of the members to reclaim such deposit so declared forfeited and divided among the others.

TRIAL of demurrer to counterclaim.

The facts are stated in the opinion.

James A. Hudson, for plaintiff.

Charles A. Johnson, for defendant.

PRYOR, J.—In extinguishment of an admitted cause of action, the defendant pleads that an equivalent sum is due it from plaintiff, in virtue of the following allegations of fact; that three incorporated companies and two copartnership firms, engaged in the manufacture and sale of wire-cloth, entered into an agreement, whereby, for the avowed object of “regulating the price” of the commodity, they constituted themselves an association, imposed upon themselves stipulated rates of charge, engaged that they “will sell no cloth at less than the prices set forth,” and, to insure obedience to this undertaking, subjected themselves to a heavy penalty for its violation; that plaintiff and defendant are parties to this agreement and association; that, pursuant to a provision of the agreement, defendant deposited \$2,000 with the United States Trust Company, to be forfeited to the other members of the association in the event defendant should violate, *inter alia*, its obligation not to sell below the stipulated price; that the association declared the \$2,000 forfeited; and that of this sum plaintiff received and wrongfully retains \$500, which defendant counterclaims against its indebtedness to plaintiff. The validity of the counterclaim is challenged for formal defects, but, as I am of opinion that the plea is bad in substance, I dismiss from consideration the technical grounds of demurrer.

The declared purpose of the agreement is to enable the

De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.

association, as between its members, to "regulate the price" of the commodity in which they deal, and this result is accomplished by empowering the association to fix a price, and by binding its members, under a penalty, not to sell below the sum so prescribed. Since all the members are to sell for the same price, of course competition between them is impossible; and, having power to fix the price, they will be impelled by the irresistible operation of self-interest to raise that price to the highest attainable figure. Here, then, is an agreement of which the inevitable effect is, in conformity with its proclaimed design, to restrict competition in trade, and to arbitrarily enhance the price of a commodity of commerce. That such a contract is repugnant to public policy, and so unlawful, is a settled principle in the jurisprudence of this country. The people have a right to the necessities and conveniences of life at a price determined by the relation of supply and demand, and the law forbids any agreement or combination whereby that price is removed beyond the salutary influence of legitimate competition.

"With results naturally flowing from the laws of supply and demand the courts have nothing to do; but when agreements are resorted to for the purpose of taking trade out of the realm of competition, the courts cannot be successfully invoked, and their execution will be left to the volition of the parties thereto" (*Santa Clara, etc., Co. v. Hayes*, 76 Cal. 387). "In its very nature, a right to exclude competition is injurious to the public" (*City of St. Louis v. Gas Co.*, 70 Mo. 69). "Public policy favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible" (*Salt Co. v. Guthrie*, 85 Ohio St. 666). "Free competition is the life of business; and all combinations for the purpose of raising or controlling the prices of merchandise are monopolies, and intolerable, and ought to receive the condemnation of all courts" (*Richardson v. Buhl*, [Mich.] 43 N. W. Rep. 1102). "The natural law of supply and demand is the best law of trade" (*State v. Goodwill*, [W. Va.] 10 S. E. Rep. 285). "Rivalry is the life of trade. The thrift and welfare of the people depend upon it" (*An-*

 De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.

derson v. Jett, [Ky.] 12 S. W. Rep. 670). "It is against the general policy of the law to destroy or interfere with free competition, or to permit such destruction or interference" (*Stewart v. Transportation Co.*, 17 Minn. 372). "Competition is the life of trade," and "combinations and confederacies to enhance the price of any article of trade or commerce are injurious to the public," and therefore illegal (*People v. Fisher*, 14 Wend. 19). "Whatever destroys or even restricts competition in trade is injurious, if not fatal, to it" (*Hooker v. Vandewater*, 4 Denio, 349, 353). "If the primary object of the firm was to prevent competition, it might be considered as against public policy," and it would be "condemned by proof that it was part of a conspiracy to control prices" (*Marsh v. Russell*, 66 N. Y. 292). "The agreement was to prevent competition, and such competition it was not lawful for the parties to prevent or attempt to prevent" (*Hartford, etc., R. Co. v. New York, etc., R. Co.*, 3 Rob. 415). "A combination to artificially enhance prices is inimical to the interests of the public, and all contracts designed to effect such an end are contrary to public policy, and therefore illegal" (*Arnot v. Coal Co.*, 68 N. Y. 558). A combination to raise the price of lard is "an unlawful plot," and an indictable misdemeanor (*Leonard v. Poole*, 114 N. Y. 371. See *Stanton v. Allen*, 5 Denio 434; *Clancey v. Manufacturing Co.*, 62 Barb. 395; *Craft v. McConoughy*, 79 Ill. 346; *Association v. Koch*, 14 La. Ann. 168; *Hilton v. Eckersley*, 6 El. & Bl. 47; *People v. Gas Trust Co.*, (Ill.) 22 N. E. Rep. 798; *People v. Refining Co.*, 7 Ry. & Corp. Law J. 83; *Watson v. Navigation, etc., Co.*, 52 How. Pr. 348; *Murray v. Vanderbilt*, 39 Barb. 141; *Wright v. Ryder*, 36 Cal. 342; *Morgan v. Donovan*, 58 Ala. 242; DANIELS, J., in *People v. Refining Co.*, 7 N. Y. Supp. 406).

Thus by the overwhelming, if not uniform, current of authority, the agreement under criticism is condemned as contrary to public policy and illegal. Nor is the operation of the rule forbidding contracts restricting competition and enhancing price limited to trade in the necessities of life, but, as appears from the citations above, extends equally and

De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.

alike to all commodities of commerce. Neither need the agreement or combination, in order to expose it to the denunciation of the law, constitute a complete monopoly or effect a total suppression of competition ; but the language of courts and of writers is that, if the agreement or combination tends to monopoly, or to reduce or lessen competition, it is contrary to public policy and unlawful, because operating *pro tanto* an artificial enhancement of price (Authorities *supra*). It results, therefore, that, as defendant's counterclaim demands the repayment of money received by plaintiff upon an illegal agreement, the court will not interpose for its restitution. The familiar maxims, *ex pacto illicito non oritur actio*, and *in pari delicto potior est conditio possidentis*, are fatal to defendant's contention.

Another vice in the agreement with which defendant's counterclaim is implicated would suffice to invalidate it. By the instrument constituting the Wire-Cloth Manufacturers' Association it is provided that, upon complaint made of its violation, the accused member shall be condemned to forfeit his \$2,000 deposit, which shall thereupon be divided in equal parts among the members who have determined his guilt and declared the forfeiture, and the answer alleges that the \$500 which defendant seeks to reclaim was received by plaintiff as its share of the \$2,000 deposited and forfeited by defendant. Plainly the tribunal so created and so empowered is obnoxious to the criticism of the Court of Appeals in *Austin v. Searing* (16 N. Y. 112), where it is said: "An agreement by which the members of an association undertake to confer judicial powers upon a body of men as a tribunal having authority to adjudicate upon alleged violations of the rules of the association, and to decree a forfeiture of the rights of property of parties adjudged to have been guilty of such violation, is void as against public policy, and the courts will not enforce such a contract, nor lend their aid to give effect to the decrees of a tribunal thus constituted." And, if the courts will refuse to enforce such an agreement, while executory, so will they decline to undo it when executed, but will leave the parties in the situation in

Vincent v. Vincent.

which, by their illegal contract, they have placed themselves (*Knowlton v. Congress, etc., Co.*, 57 N. Y. 518; *Haynes v. Rudd*, 83 N. Y. 251). The agreement under consideration is even more repugnant to law than that condemned in *Austin v. Searing*, for it constitutes the persons who are to benefit by the forfeiture the tribunal by which it is to be decreed, contrary to the principle of natural justice that no man shall be a judge in his own cause (Broom Leg. Max. 116)—a principle so inviolable that not even an act of parliament can impugn it (*Day v. Savadge*, Hob. 85, 87). If, on the other hand, we suppose the agreement to be valid, and the tribunal that inflicted the forfeiture legal, the same result follows,—that defendant cannot reclaim money paid in conformity with its own contract, and by the decree of a court of its own choosing. In any view, the counterclaim is untenable, and the demurrer must be sustained.

EMILY VINCENT, Plaintiff, *against* LUDGER C. VINCENT,
Defendant.

[SPECIAL TERM.]

(Decided February 11th, 1891.)

To authorize an allowance of alimony *pendente lite*, the existence of the marital relations must be shown to the satisfaction of the court; but the fact need not be established with the clearness and conclusiveness exacted of proof as the basis of a final adjudication upon the rights of the litigant parties. And if a marriage in fact be shown to the satisfaction of the court, but the alleged husband challenges its validity because of his incapacity to contract the relation, the burden is upon him to defeat the *prima facie* case, and to establish his defense.

On a motion by plaintiff in an action for divorce for an allowance of alimony during the litigation, the evidence tended to establish that defendant, a practicing physician, debauched plaintiff, then a girl seventeen years of age, while in his office and under his professional care, and continued an illicit connection with her, which resulted in her pregnancy; that upon her demanding, in fulfilment of his promise, a ceremonial marriage, he, professing to be an unbeliever and unwilling to enter a church, proposed

Vincent v. Vincent.

that they should live together, saying to her that she was his wife, exactly the same as though married by a minister; that she accepted this assurance and took up her residence in his house and lived with him as his wife nearly four years, during which time they were regarded by friends and acquaintances as husband and wife, and he introduced and represented her as his wife; and that, some months after the date on which such agreement was made, he gave her a wedding ring inscribed with their initials and the said date. *Held*, that this was sufficient, for the purpose of such a motion, to establish the fact of marriage, notwithstanding the intercourse was illicit in its origin, and defendant denied the marriage; his testimony being unsupported, and in conflict with his acts and admissions, while that of plaintiff was corroborated.

Defendant's answer in the action did not allege a former marriage, but his affidavit on such motion contained an averment that he "is a married man and has been such for many years." *Held*, that this did not so conclusively show the illegality of his marriage with plaintiff as to defeat the motion, although the averment was not controverted by her in her answering affidavit otherwise than by her saying she did not believe it.

MOTION for alimony and counsel fee pending an action for divorce.

The facts are stated in the opinion.

W. M. K. Olcott, for plaintiff.

Hirsh & Rasquin, for defendant.

PRYOR, J.—That to authorize an allowance of alimony *pendente lite*, the existence of the marital relations must be shown to the satisfaction of the court, is a settled rule in the jurisprudence of this state. But, as in other preliminary contestations, the fact is not to be established with the clearness and conclusiveness exacted of proof as the basis of a final adjudication upon the rights of the litigant parties; but it suffices if, on an application for alimony, the putative wife make out "a reasonably plain case of the existence of the marital relations" (*Brinkley v. Brinkley*, 50 N. Y. 184).

Again, if a marriage in fact be shown to the satisfaction of the court, but the alleged husband challenges its validity because of his incapacity to contract the relation, the burden is upon him to defeat the *prima facie* case, and to establish his affirmative defense (*North v. North*, 1 Barb. Ch. 241;

Vincent v. Vincent.

Smith v. Smith, 1 Edw. Ch. 255; *Brinkley v. Brinkley*, 50 N. Y. 184, 193), where it is said: "When, marriage in fact being denied, the affirmative is on the party claiming to be the wife to show that an actual marital relation ever existed, there alimony will be denied until the fact is proven to the satisfaction of the court, or is admitted; . . . where an actual marriage has been admitted or shown, and its existence in law is sought to be avoided by some fact set up by the husband, and it devolves upon him to show that fact, there alimony will be granted until that fact is shown." And on page 194, "Any facts and circumstances being shown which are sufficient for a court to presume therefrom an actual marriage, they are also sufficient for a court thereon to found an order granting temporary alimony, though other allegations which are at issue, once being established, would repel such a presumption." Bearing in mind this authoritative enunciation of the rule of law governing the case, I proceed to inquire: first, whether, upon the proofs, the fact of an actual marriage satisfactorily appears; and secondly, whether the defendant so conclusively shows the illegality of the marriage, as to render it impossible for the plaintiff to prevail on the trial.

It is the settled law of this state, that while, on the one hand, repute and cohabitation do not constitute marriage, but are only evidence of it, yet on the other, that no form or ceremony is requisite to its validity, but that to the legal sufficiency of the marriage, as of every other contract, nothing more is indispensable than an agreement of capable parties. Hence, "an agreement made in the present tense, whereby the parties assume towards each other the marital relation, is an actual marriage. This agreement may be written or verbal, with or without witnesses, and may be proved like any other contract. When proved to the satisfaction of a court of justice, it constitutes a lawful marriage" (*Bissell v. Bissell*, 55 Barb. 325; *Fenton v. Reed*, 4 Johns. 52; *Clayton v. Wardell*, 4 N. Y. 260; *Ferrie v. Public Administrator*, 3 Bradf. 151; *Rose v. Clark*, 8 Paige 574; *Matter of Taylor*, 9 N. Y. 611; *Cheney v. Arnold*, 15 N. Y. 345; *Hayes v. People*,

Vincent v. Vincent.

25 N. Y. 890 ; *Van Tuyl v. Van Tuyl*, 57 Barb. 235 ; *Brinkley v. Brinkley*, 50 N. Y. 197, 198).

The evidence in this case tends to establish, and to my mind does establish, that in November, 1886, defendant, a practising physician, by a promise of marriage, debauched the plaintiff, a girl seventeen years of age, in his office and while she was under his professional care ; that their illicit connection continued, and resulted in her pregnancy ; that on the 22d of February, 1887, she took up her residence in his house, and lived with him as his wife until the 3d day of January, 1891 ; that meanwhile they were recognized and regarded by friends and acquaintances as husband and wife ; that he introduced and represented her as his wife ; that he gave her a wedding ring inscribed " L. C. V. to E. F., Feb. 22, 1887 " (her maiden name being Emily Finney) ; that on the 22d of February, 1887, she demanded of him, in fulfillment of his promise, a ceremonial marriage, but, professing to be an " unbeliever," and unwilling to enter a church, he said to her, " we will now live together ; you are my wife and every one will know it, and we are exactly the same as though married by a minister ; " and that she accepted this assurance, and acted upon it, by assuming towards him the relation of lawful wife.

Thus the fact of the marriage of these parties is established by every species of evidence.

First, the fact is shown by repute and cohabitation. It is argued, however, that, the intercourse being illicit in its origin, proves a meretricious, not a matrimonial, cohabitation. But the presumption against the marital relation from the fact of its licentious inception, is repelled by proof of a subsequent marriage ; and to establish a change from a meretricious to a matrimonial connection, " it is not essential to show the precise time and occasion thereof ; it is sufficient if the facts show that such a change must have occurred " (*Badger v. Badger*, 88 N. Y. 548).

Here the proof is explicit and precise of the transformation of the connection into a matrimonial relation by the " new marriage contract," which the Court of Appeals decides to

Vincent v. Vincent.

be sufficient and effectual for the purpose (*Collins v. Collins*, 80 N. Y. 1).

In the second place, the admissions of the defendant furnish cogent evidence of the fact of a marriage. Not only did he, in a general way, hold plaintiff out to the world as his wife, but he specifically and in writing introduced her as such; he gave her child his name; and by the present of the marriage ring he purposely provided her with an enduring testimonial of their honorable relation (*Bissell v. Bissell*, 55 Barb. 325).

Finally, the conjugal relations of these parties are established by direct and positive proof of an actual marriage in conformity with the law of the state. True, the defendant denies this marriage; but his testimony is unsupported and is in conflict with his own acts and admissions, while that of the plaintiff is so corroborated as to carry conviction to the judgment.

Assuming the fact of an actual marriage between the parties, defendant impugns its validity upon the ground that he was already a married man; and the question is, does he give satisfactory proof that at the time of his marriage with plaintiff he had a then living and lawful wife?

No such defense is alleged in the answer, which consists only of admissions and denials. It controverts the allegation of marriage in the complaint, but omits either to aver the invalidity of the imputed marriage or to allege the former marriage of the defendant. Can he, upon the pleadings, prove such invalidity or former marriage? In *Collins v. Collins* (80 N. Y. 2), a similar case, the answer alleged former marriage; and such I suppose to be the proper pleading. If the complaint exhibit a contract illegal on its face a demurrer reaches the defect. But if the complaint show a contract apparently valid, but which is avoidable by matter aliunde, the answer must allege that matter, or else the defendant be debarred of the defense. Hence, usury must be pleaded (*Haywood v. Jones*, 10 Hun 500). So, a gambling consideration (*Goodwin v. Ins. Co.*, 73 N. Y. 480, 496; *Vischer v. Bogg*, 21 Week. Dig. 399). So, that the contract is contrary

Vincent v. Vincent.

to public policy (*Schreyer v. Mayer*, 89 Super. Ct. [J. & S.] 1; *Cummings v. Barkalow*, 1 Abb. Ct. App. Dec. 479). So, that the contract is void under the statute of frauds (*Porter v. Wormser*, 49 N. Y. 432; *Myers v. Dorman*, 34 Hun 115).

The rule is that if the contract be not void on its face, and plaintiff can make out his case without exposing its invalidity, the defense of illegality must be pleaded (*May v. Burras*, 13 Abb. New Cas. 384; *Tuthill v. Roberts*, 11 Week. Dig. 35; *Valton v. Ins. Co.*, 20 N. Y. 32; *O'Toole v. Garvin*, 1 Hun 92; *Codd v. Rathbone*, 19 N. Y. 37). However the rule may be elsewhere, in this court it is settled that the defense of the illegality of the contract must be pleaded in the answer (*Boswell v. Welshoefer*, 9 Daly 196).

In this case the complaint alleges a valid contract of marriage, and plaintiff proves it. Plainly the fact that defendant had another wife is new matter in avoidance, and so, upon principle and authority, must be pleaded to be available. As the defense, therefore, is not in the case, I might decline to consider it as a bar to alimony. Looking, however, to the defense, as stated in the affidavit, I do not conceive it to be so conclusively established as to make hopeless an attempt to contest it; and so, upon the authority of *Brinkley v. Brinkley* (*supra*), plaintiff should be awarded alimony pending the litigation. The affidavit sets forth the defense in these words: "This deponent further says he is a married man and has been such for many years, though living separate and apart from his wife." Is this meagre statement a sufficient allegation of the fact that, at the time of his marriage with plaintiff, he had a living and lawful wife? Who she is, where she is, when, where or how he married her; each of these circumstances defendant industriously avoids to indicate. Whether the alleged wife be now living, or, if living, undivorced from defendant, is not clearly and conclusively apparent upon the pleading. Nay more, defendant's allegation may be literally true, and yet he not have been a married man when he married the plaintiff. The allegation is that he has been a married man "for many years;" but his affidavit is dated 23d January, 1891, and his marriage with plaintiff occurred 22d

Matter of Blair.

February, 1887—nearly four years ago. It is, therefore, not a necessary inference from the allegation that defendant was married to another woman at the time he wedded with plaintiff; nor, on a prosecution for bigamy or perjury, would that allegation suffice for his conviction.

In pleading the illegality of a contract the defendant should be held to clear and positive averments. Hence, in an action against a common carrier for non-delivery, it was held that an answer of an intention to smuggle, without more particulars, was insufficient (*Donovan v. Compagnie*, 89 Super. Ct. [J. & S.] 519). At all events, such an allegation as we have here from the defendant is ineffectual to overcome the presumption, in favor of innocence, that the marriage in fact was a marriage in law and that the issue thereof is legitimate.

The objection now urged that plaintiff, in her answering affidavit, does not sufficiently controvert defendant's allegation of his former marriage by saying *she does not believe it is* of no force; for how could she otherwise challenge a fact so baldly stated, without predicate of time, place, circumstance or person? To conclusively disprove the allegation would require of her evidence that defendant was not married to any one of the millions of women on the habitable globe—a preposterous undertaking.

The motion is granted, with costs, and the alimony is fixed at \$25 a week and the counsel fee at \$300.

In the Matter of the Probate of the Alleged Last Will and Testament of WILLIAM T. BLAIR, Deceased.

[TRIAL TERM.]

(April 20th, 1891.)

Formalities prescribed for the execution of a will, and made by statute indispensable to the validity of a testamentary paper, are: (1) the paper must be subscribed by the testator in the presence of the attesting witnesses; (2) each of the attesting witnesses must sign his name at the end of the paper; (3) the testator, at the time of his subscription, must, in the presence of the witnesses, declare the instrument to be his will; (4) each wit-

Matter of Blair.

ness must sign his name at the request of the testator; and (5) either the subscription of the will by the testator must precede the signing by the witnesses, or he must subsequently acknowledge his subscription in their presence.

In the statutory requirement of "sound mind and memory" to constitute testamentary capacity, those terms are not to be taken in their literal and absolute sense. A person who is able to recollect the objects of his bounty and the particulars of his property, to understand the provisions of the will, and to exercise a rational judgment in the transaction, is of testamentary capacity, however aged or infirm he may be, though age and infirmity may be considered in determining the question; but mental and physical debility alone does not incapacitate.

The undue influence which renders invalid a will thereby procured is such influence as suppresses the independent volition of a testator—as destroys his free agency—and constrains him to give expression to the will of another instead of his own.

Circumstances which the law recognizes as indicating the absence of undue influence are, that the will expresses the known and declared purpose of the testator; that the testamentary disposition is in harmony with his mental inclination; that the instrument was drawn in conformity with his instructions, and that he subsequently expressed his satisfaction with it. On the other hand, the law recognizes, as indicating the presence of undue influence in the testamentary act, such circumstances as physical and mental weakness of the testator at the time; discrepancy between his declared intention and the provisions of the will; unnatural or unjust testamentary dispositions; exclusion of heirs from any knowledge of the making of the will; and the fact that a beneficiary stands in a confidential relation to the testator.

TRIAL of issues in a proceeding for revocation of probate of a will transmitted from the Surrogate's Court of the County of New York.

The proceeding was upon a petition by Sarah Catherine Blair, an infant over fourteen years of age, legatee under the will and heir-at-law of William T. Blair, deceased, to revoke the probate of said will. Her petition alleged that a previous petition for revocation of said probate was filed by Catherine B. Blair, the widow of said William F. Blair, deceased, but was dismissed for irregularity in the citation. Issues were formed and transmitted to this court for trial by a jury.

PRYOR, J., charged the jury.—Gentlemen of the Jury: Three questions are submitted for your determination. First. Was the paper propounded as the last will and testament of

Matter of Blair.

William T. Blair, deceased, executed in conformity with the provisions of the statute? Second. Had he testamentary capacity at the time of the execution of the instrument? Third. Was the instrument his own voluntary act, or was it the product of undue influence?

The solution of these questions is for you, and you alone; you must determine the credibility of witnesses; you must estimate the weight of conflicting evidence; you must ascertain what facts are established by the evidence; you must deduce all inferences from the established facts. My province is only to instruct you as to the rules of law which should guide your deliberations. Your verdict must necessarily be compounded of law and fact; and while the facts are exclusively for your decision, you must accept the law as it shall be delivered to you by the court.

The law has prescribed certain formalities in the execution of a will, and has made the due observance of them indispensable to the validity of a testamentary paper. The first requisite is that the paper be subscribed by the testator in the presence of the attesting witnesses. This fact being established by uncontroverted evidence, you must find that the paper was subscribed by the testator in due compliance with the legal prescription. The second requisite is, that each of the attesting witnesses must sign his name at the end of the paper; and this fact also being proved without contradiction, you must find accordingly. The third requisite is, that the testator, at the time of his subscription, must, in the presence of the witnesses, declare the instrument to be his will. Upon this point I charge you that the evidence so conclusively establishes the due publication of the will, that you must accept it as an uncontroverted fact in the case. The fourth requisite is, that each witness must sign his name at the request of the testator; and I charge you that this condition, too, is so conclusively established that you must accept it as an uncontroverted fact in the case. But there is a fifth and final requisite to the due execution of a testamentary paper, namely, the subscription of the will by the testator must precede the signing by the witnesses, unless he subsequently

Matter of Blair.

acknowledge his subscription in their presence. Of such subsequent acknowledgment there is no evidence in the case; and so the question is whether the testator subscribed the paper before or after it was signed by the witnesses. And this, gentlemen, is the only question before you touching the due execution of the paper in controversy. One of the attesting witnesses, Dr. Hawes, said quite positively that he signed before the testator, and that he thought both the witnesses signed before the testator; but the other witness and Mr. Zittel swore unequivocally that the testator had subscribed the paper when the witnesses signed it. It is for you to say how the fact is—whether the testator signed before or after the witnesses. If you find that the testator signed the paper before the witnesses, you will answer yes to the first interrogatory; if you find that the testator signed after the witnesses, you will answer no to that interrogatory. But in submitting this question to you for your decision, it is my right and my duty to say that, in the opinion of the court, the clear weight of evidence is that the testator signed the paper before the witnesses. Still, the question is for your arbitrament.

Before proceeding to instruct you upon the other issues submitted for your determination, I would impress you with the importance of two considerations. The first is, that every man of legal competency has the right to dispose of his property by will. This right the law gives him, and if the right be legally exercised, no person whatever can challenge or defeat it. The accumulation of property, which, by his own industry and frugality, a man has made, he may distribute at his death according to his own good pleasure; and, provided his testamentary dispositions be in conformity with law, they are final and irreversible. The second consideration is involved in the first, and it is that when a man has made a valid will, neither court nor jury, nor both combined, can defeat or disturb its intended operation. If the will be legal, neither court nor jury has the authority to pass upon its wisdom or justice, or to redress its supposed follies or inequalities. No matter how flagrantly a testator has violated the obliga-

Matter of Blair.

tions of affection or friendship, no matter how grievous the disappointment of husband or wife, or of son or daughter, his will, if valid, must stand, and his moral delinquencies must be left to the cognizance of that higher tribunal before which he has already appeared.

It is submitted to you to determine whether the testator was competent to make a will. In order to testamentary capacity, the statutes require "a sound mind and memory." But these terms are not to be taken in their literal and absolute sense. The "sound mind and memory" which the law exacts as a condition of testamentary competency, do not mean a mind without flaw or a memory without fault. To require such an ideal mind and memory would be a virtual denial of the power to make a will; because imposing a condition incompatible with human infirmity. Neither is it requisite to testamentary capacity that the mind and memory be of the ordinary or average standard of the human intellect. Nor yet is a mind, weakened and disordered by age and bodily maladies, necessarily incompetent to the testamentary act: for, such a mind may still possess the intelligence and integrity which the law adjudges to be sufficient. What, then, gentlemen, is that measure of mental strength and soundness which the law prescribes as requisite and as adequate to the performance of the testamentary act? I give you the answer in the language of the highest court in the state: "It is essential that the testator has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and meaning of the provisions of his will. He must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive, at least, their obvious relations to each other, and be able to form some rational judgment in reference to them. A testator who has sufficient mental power to do these things is, within the meaning and intent of the statute of wills, a person of sound mind and memory, and is competent to dispose of his

Matter of Blair.

estate by will." This, gentlemen, is the legal standard and criterion of testamentary capacity; and by this standard and criterion, and this standard and criterion alone, you are to determine the competency of William T. Blair to make this will. If you find that, at the time he executed the instrument in controversy, he had the mental power indicated by this standard—no matter how aged and infirm he was—your answer to the second interrogatory must be in the affirmative. On the other hand, if you believe that he had not that measure of mental power—and, in solving the question, you may consider his age and infirmity—if, upon all the evidence, you find that he had not that measure of mental power, your answer must be in the negative.

But, although a man have legal capacity to make a will, still the will may not be the act of his own independent volition, but may be the involuntary effect of undue influence; and whether the paper in controversy be the product of undue influence is submitted for your decision.

Obviously, you cannot determine whether the testator executed the paper under the pressure of undue influence, unless you know what is "undue influence." This is a legal term, and you must understand and apply it in the sense which the law attaches to it. The expression is not influence simply, but undue influence. What, then, is the legal conception and definition of undue influence?

I charge you, gentlemen, that as, on the one hand, undue influence does not necessarily involve physical force, constraint or violence, so, on the other hand, undue influence implies something more than mere advice, argument, or persuasion. Advice, argument, and persuasion, if they convince the reason and move the affections only—leaving the will still free and unfettered—are not *undue* influence—influence they are certainly, but not *undue* influence. But, even advice, argument, and persuasion, if they be so importunate and persistent, or otherwise so operate, as to subdue and subordinate the will of the testator to the will of another, till the testamentary instrument speak not his own mind and his own purpose, but the wish and purpose of another—such advice,

Matter of Blair.

argument, and persuasion, so operating and with such effect, is undue influence. To be *undue* influence, the influence must amount to moral coercion; but if it amount to moral coercion it is *undue* influence, no matter how or by what instrumentalities produced. The human mind is so fearfully and wonderfully made; is open and amenable to such a diversity of influences; the mind of one man so differs from the mind of another; the influences which sway the mind of one man are so different from the influences which sway the mind of another; and the moving springs of mental operation are so veiled from observation—that it is impossible to know all the considerations that are compulsive upon the human will, or to measure exactly the precise force of any particular motive in determining human action. It results, therefore, that although in order to find the fact of undue influence in the production of the paper in controversy, you must be satisfied that undue influence was actually exerted over the testator in the testamentary act; yet to the finding of that fact it is not necessary that you should know what particular agencies were employed to overcome the free will of the testator. And, while you may not find the fact of undue influence upon mere suspicion or surmise, yet it is not necessary that you be able to lay your finger on any particular act of undue influence exerted over the testator. It is enough if, upon all the evidence, you are convinced that the paper does not speak the true and voluntary purpose of the maker. To recapitulate: If a person be persuaded by appeals to his reason, his affection or his sense of duty, to make a will contrary to what he contemplated, yet, if the act be the legitimate result of such persuasion acting upon his untrammelled judgment, it is not an unlawful persuasion, and the will is not the effect of his surrender of free agency. If, however, such a persuasive appeal be made to a person of too feeble a mind to resist, or to one who, from physical or mental weakness, is incapable of withstanding or repelling the importunity, such persuasion or importunity would be undue influence; because it overpowered and controlled the will of the testator, and his act became but the expression of the volition of another.

Matter of Blair.

As already intimated to you, gentlemen, it is not necessary that the fact of undue influence be proved by direct evidence. Indeed, as you must perceive, the fact in its very nature is to be inferred rather from circumstances—from the surroundings of the testator, the character of the will, his family and social relations, the condition of his health and mind, his dependency upon and subjection to the control of the person supposed to have wielded the influence, the opportunity and disposition of that person to wield it, and the acts and declarations of such person. Each case must be determined according to its own peculiar facts and circumstances, having in view the simple principle that no instrument can be established as a will unless it speak the free and voluntary purpose of the testator. If it be the will of another, to which the testator assented from mere habit, produced by prostration of body and mind and a sense of helpless dependence, then it is not his will, and should be rejected as the product of undue influence.

There are certain facts and circumstances, gentlemen, which the law recognizes as indicative of the presence or absence of undue influence—as evidence of undue influence or the contrary—evidence the weight of which, however, you are to determine.

On the one hand, if the instrument express the known and declared purpose of the testator, the presumption is that it is the emanation of his own untrammelled volition. But, I am bound to say to you that here is no evidence that, prior to the execution of the instrument, the decedent intended to make such a disposition of his property as is contained in the paper before you. In the next place, if the testamentary disposition runs along the line of affection—is in harmony with the mental inclination of the testator—that is a circumstance of importance to identify the instrument as an authentic expression of his wish and purpose. But, I recall no evidence in the case indicating such an indifference towards the contestant on the part of the testator, as would make probable the small and precarious provision for her support contained in the paper before you. The provision

Matter of Blair.

for her is not only slight in relation to the value of his estate, but may be altogether illusory; for, as the contestant is to enjoy the \$1,000 a year only until she reaches the age of twenty-five, and is not to receive it at all before the death of her grandmother, it is quite obvious that, as the grandmother may not die until after the contestant has arrived at the age of twenty-five, she may never receive a penny of the provision. Now, the contestant was the only surviving representative of the testator's name and blood—sole daughter of his house and heart—and this is all the provision he makes for her. It may be that this was precisely the provision he intended for her, and that, for reasons unknown to us but satisfactory to himself, he purposely chose to mock her with a benefit that might be dead sea fruit on her lips. But, this delusive provision for his granddaughter may have been imposed upon the testator, contrary to his will, by an alien influence. What the fact is, it is for you to say upon the evidence. Again, the fact, if it be such, that the instrument was drawn in conformity with the instructions of the testator, and that he subsequently expressed his satisfaction with it, is strong evidence in disproof of undue influence. But, you are to consider that instructions for a will may be the dictate of the undue influence which presides over its execution, and that the same undue influence may prompt the expression of satisfaction with the instrument. Hence, neither prior instructions nor subsequent recognition are incompatible with the presence and prevalence of undue influence in the concoction of the paper. The draughtsman of this will testified that he got his instructions from the testator; but what those instructions were, and whether the will conforms to them, he did not tell you. Moreover, you are to remember that the draughtsman was engaged by the man to whom the undue influence is imputed, that he was present when the instructions were given, and that his were the hands by which both the first draught and the perfected instrument were conveyed to the testator. And, as to the testator's expression of satisfaction with the instrument, you will recollect that that too was in the presence of the chief

Matter of Blair.

beneficiary and the man charged with the undue influence, and in their presence alone. Recalling these and all other circumstances bearing on the fact, it is for you to measure the weight due to the prior instructions and subsequent recognition, in disproof of the allegation of undue influence.

On the other hand, as there are circumstances which the law recognizes as indicating the absence of undue influence, so there are circumstances which the law recognizes as indicating the presence of undue influence in the testamentary act.

While age and infirmity are not, of themselves, evidence of undue influence, yet the physical and mental weakness of the testator at the time of the testamentary act is an important circumstance for your consideration, because it is a fact of universal observation that the strength of the will depends largely upon the bodily condition, and we know that a pressure that would weigh as light as a feather upon a robust and vigorous constitution might be irresistible to a mind exhausted by sickness and suffering.

As a consistency between declared testamentary intention and the provisions of a will affords a strong presumption that the will speaks the mind of the testator, so, conversely, a discrepancy between declared intention and the provisions of the will raises a presumption, more or less strong, that the will does not speak the mind of the testator. But this presumption may be overcome by evidence that the provisions of the will are, nevertheless, the dictate of the independent volition of the testator. Now, it is an uncontroverted fact that by a previous will this testator had made liberal provision for his granddaughter—a provision which contrasts glaringly with the meagre provision in the paper before you. You have heard the explanation given for the proponents of this change in the testamentary intention of the decedent, and it is for you to say whether the change is satisfactorily accounted for—whether the change authorizes any inference of undue influence in the procurement of the paper before you.

If the testamentary dispositions be unnatural or unjust,

Matter of Blair.

that circumstance may be indicative of undue influence. It is for you to say whether the dispositions in the paper before you be unnatural and unjust, and whether they authorize any inference of undue influence.

Clandestinity in the execution of a will, that is, exclusion of heirs from any knowledge of the will making, may be significant of some sinister interest in the concoction of the will. It does not appear that the contestant ever had any intimation of the preparation of this paper; but it does appear that when Zittel came to read it to the testator and the chief beneficiary under it, the doors and windows were closed. It is for you to say what, if any, inference of undue influence you will deduce from this circumstance.

The fact that a beneficiary stands in a confidential relation to the testator—much more if the beneficiary have any agency in making the will—may be evidence of undue influence. Mr. Zittel was the confidential friend and constant companion of the testator. Mr. Zittel, though not a legatee or devisee under the will, is an executor, and an executor whom the testator expressly exempts from security for the faithful discharge of his official duties. Mr. Zittel derives a pecuniary advantage from his position as executor. Now it was Mr. Zittel who procured Thurston to draw the first will. It was Zittel who procured Mr. Wright to draw this will. The will was drawn at Mr. Zittel's house. It was drawn by a lawyer, who had had professional relations with Mr. Zittel, and whom it does not appear that the testator knew. Wright gave the first draft to Zittel, and Zittel took it to the testator. Wright gave the perfected draft to Zittel, and Zittel took it to the testator. Zittel was present when Wright got his instructions for the will from the testator, but he says he did not hear them. Zittel took Van Gaasbeck to witness the will. Zittel got Mills to be co-executor of the will. After the will was executed, Zittel took it and kept it until the death of the testator. For about three weeks before the will was executed, Zittel was talking to the testator about it. Finally, Zittel suggested a provision in the will, and the testator adopted it. Such, gentlemen,

Matter of Blair.

was the active agency of Mr. Zittel in the preparation of the paper before you. And yet he may not have exerted any undue influence upon the testator. His entire connection with the transaction may have been due to the promptings of disinterested friendship, and may have operated within the limits of legitimate suggestion. Or, Mr. Zittel may have brought undue influence to bear upon the testator. What the fact is, it is for you to say.

The principal beneficiary of the will is the testator's widow. Dr. Hawes says that before he would witness the will he asked the testator if it was satisfactory to his wife. In response to an inquiry why he so asked, he replied that it was because of a controversy between them. Here, then, was a controversy between the testator and his wife. What was that controversy? Did the wife wish the testator to abandon some testamentary intention that he entertained? And if so, did she confine her solicitations to legitimate persuasion, or did she pursue her purpose within the region of undue influence? That the testator was anxious that the will should satisfy his wife is plainly apparent. He told Dr. Hawes that he had read the will to her, and that she assented to it. When the will was read by Zittel to her and the testator she said it was satisfactory. It was natural and proper that the testator should desire to satisfy his wife, and her solicitude about the will and his desire to please her by its provisions are of no weight against the validity of the will, unless out of them came some effort to mould the will in her interest which amounted to undue influence.

It is my duty now, gentlemen, to direct your attention to a piece of evidence which, according as you may view it, is of great or of no importance in the decision of the case.

The contestant produced a petition for the revocation of the probate of the will signed by the widow of the testator. In that petition she declared, under oath, that the testator was incapable of making a will, and that it was procured from him by undue influence. Mrs. Blair knew perfectly well the mental condition of her husband, and she was in a situation to be cognizant of any undue influence upon him. Her

Matter of Blair.

representation of these facts was clearly and essentially against her interest. Now, the law recognizes declarations against interest as a cogent species of evidence. But Mrs. Blair denies these declarations. She says the paper was fraudulently imposed upon her; that she believed she was signing a petition to compel the executors to give bond for their faithful conduct; that she never knowingly made the declarations now imputed to her. If her story be true, not only does her signature of the petition weigh nothing against the will, but, on the contrary, it tells heavily against the contestant, for the contestant procured the notary to certify this alleged fraudulent paper. But Mrs. Blair's story is contradicted. Mr. Wood, the lawyer who drafted the petition, swears that he drew it under her instructions; that he read it to her in the presence of her daughter-in-law and her granddaughter; that he explained to her what the effect of the proceeding initiated by the petition would be upon her interest under the will; that he left the petition with her, and that it was returned to him, signed, sworn to and certified by the notary. The notary testifies that, in reply to inquiry by him, Mrs. Blair said she knew the contents of the petition, and that they were true. Which of these stories is the fact? Gentlemen, it is for you to say.

The witnesses to the will testify that, at the time of its execution, the testator was capable of making a will. A number of persons who had known the testator for years, and who have no apparent interest to falsify the fact, testify to his mental competency, even after the execution of the will. On the contrary, other witnesses, apparently disinterested, impugn his testamentary capacity. The uncontroverted evidence shows him to have been, at the time of the execution of the paper before you, in a condition of mental and physical debility. But, mental and physical debility alone does not incapacitate a man to make a will. To be incapable of making a will, a man must be in a condition which disables him to recollect the objects of his bounty and the particulars of the property he is about to bequeath, to grasp the provisions of the paper he is executing, and to form

Matter of Blair.

a rational judgment of the transaction in which he is engaged. Unless the testator was in that condition—unless he was able to recollect the object of his bounty and the particulars of his property, to understand the provisions of the will, and to exercise a rational judgment in the transaction, he was not of testamentary capacity, and you must answer no to the second interrogatory. If he was in that condition—if he was able to recollect the objects of his bounty and the particulars of his property, to understand the provisions of the will, and to exercise a rational judgment in the transaction—then he was of testamentary capacity, and your answer to the second interrogatory must be in the affirmative.

Undue influence is such influence as suppresses the independent volition of a testator—as destroys his free agency—and constrains him to give expression to the will of another instead of his own. If, upon all the evidence, you believe that the paper before you embodies the unconstrained will of the testator—expresses his own voluntary wish and purpose—you must answer no to the third interrogatory. But, if, on the other hand, you believe that the paper does not declare the free and unconstrained desire and intention of the testator, you will answer that interrogatory in the affirmative.

Gentlemen, the case is of importance not only to the parties in litigation, but to every member of the community; because, on the one hand, it affects the right of a man to dispose of his property by will as he may see fit; and, on the other, it affects the interest of heirs and next of kin that they be not disappointed in their just expectations by an irrational or fraudulent disinheritance. Because of the great importance of the case, I beg, and I believe, that you will decide it without prejudice or partiality, and that you will be guided to your conclusion by no other motive than a desire to do justice according to the law and the evidence.

INDEX.

ABANDONMENT.

See LANDLORD AND TENANT,
3, 4, 8.
MASTER AND SERVANT, 8.

ABATEMENT.

See ACTION.

ACCEPTANCE.

See BILLS AND NOTES, 3, 4.
LANDLORD AND TENANT, 8.

ACCIDENT.

See NEGLIGENCE.
RAILWAYS, 11-14.

ACCOUNTING.

See APPEAL, 13.
ASSIGNMENT.
ASSIGNMENT FOR BENEFIT
OF CREDITORS, 2.

ACKNOWLEDGMENT.

The presumption, in the absence of evidence as to the time of delivery of a release under seal, that it was delivered on the day of its date, is not overcome by the fact that the acknowledgment annexed to it was taken on a subsequent day, where it does not appear that the person who executed it had possession of it when he made such acknowledgment. *Crager v. Reis*, 450.

ACTION.

Defendant having been in the employ of plaintiffs as book-keeper

and cashier, it being his duty to receive payment of money and turn it over to them and enter the receipt thereof in their books, they brought an action against him for conversion of a part of a sum of money which they alleged he had received for them, but had entered in their books and accounted for part only thereof. *Held*, that the pendency of such action was not a bar to another action by them to recover from him another payment subsequently received by him, as money had and received to their use; as the receipt of and failure to account for each sum constituted a separate cause of action, although both demands arose out of his employment. *Shook v. Lyon*, 420.

See ARBITRATION.

BROKERS.

CHATTEL MORTGAGES.

CONTRACTS, 3, 7-10.

DAMAGES.

FORECLOSURE.

INSURANCE, 1.

JUDGMENT.

LANDLORD AND TENANT,
1-6, 9, 12-15.

LIMITATION OF ACTIONS.

MASTER AND SERVANT, 2,
3, 5, 6, 8-10.

MECHANIC'S LIEN, 2, 5, 7, 8.

NEGLIGENCE.

PRINCIPAL AND AGENT,
4-6.

RAILWAYS.

REPLEVIN.

SALE, 2, 4, 6-8.

SHERIFFS.

SLANDER.

ADULTERY.

See DIVORCE, 2-4.

AGREEMENTS.

See CONTRACTS.

ALIMONY.

1. To authorize an allowance of alimony *pendente lite*, the existence of the marital relations must be shown to the satisfaction of the court; but the fact need not be established with the clearness and conclusiveness exacted of proof as the basis of a final adjudication upon the rights of the litigant parties. And if a marriage in fact be shown to the satisfaction of the court, but the alleged husband challenges its validity because of his incapacity to contract the relation, the burden is upon him to defeat the *prima facie* case, and to establish his defense. *Vincent v. Vincent*, 534.
2. On a motion by plaintiff in an action for divorce for an allowance of alimony during the litigation, the evidence tended to establish that defendant, a practicing physician, debauched plaintiff, then a girl of seventeen years of age, while in his office and under his professional care, and continued an illicit connection with her, which resulted in her pregnancy; that upon her demanding, in fulfillment of his promise, a ceremonial marriage, he, professing to be an unbeliever and unwilling to enter a church, proposed that they should live together, saying to her that she was his wife, exactly the same as though married by a minister; that she accepted this assurance and took up her residence in his house and lived with him as his wife nearly four years, during which time they were regarded by friends and acquaintances as husband and wife, and he introduced and represented her as his wife; and that, some months after the date on which such agreement was made, he gave her a wedding ring inscribed with their initials and the said date. *Held*, that this was sufficient, for the purpose of such a motion, to establish the fact of marriage, notwithstanding the intercourse was illicit in its origin, and defendant denied the marriage; his testimony being unsupported,

and in conflict with his acts and admissions, while that of plaintiff was corroborated. *Ib.*

3. Defendant's answer in the action did not allege a former marriage, but his affidavit on such motion contained an averment that he "is a married man and has been such for many years." *Held*, that this did not so conclusively show the illegality of his marriage with plaintiff as to defeat the motion, although the averment was not controverted by her in her answering affidavit otherwise than by her saying she did not believe it. *Ib.*

AMENDMENT.

See APPEAL, 16.
JUDGMENT, 2, 3.
PLEADING, 3, 7.

APPEAL.

1. On appeal from an order refusing to vacate and set aside an attachment and a judgment entered in the attachment suit, the court is not limited, in its inquiry into the validity of the proceedings, to the judgment roll, but may consider additional papers. *Deimel v. Scheveland*, 34.
2. In an action for damages to plaintiff's property from the construction, maintenance, and operation of an elevated railroad in the street in front thereof, the admission of evidence on the part of the plaintiffs of the value of the premises without the location of the road, is not ground of reversal, where similar evidence was admitted on defendant's part. *Thompson v. Manhattan R. Co.*, 64.
3. Defendants in such an action cannot object to the refusal of the court to allow evidence of the decline in rents of the neighboring property, where evidence of the same character offered by plaintiff had been excluded on defendants' objection. *Mooney v. New York El. R. Co.*, 145.
4. In an action to recover possession of chattels mortgaged to plaintiff, consisting of a horse valued at

- \$200 and harness valued at \$50, the evidence as to value was uncontradicted, but the court awarded judgment for \$40 only. *Held*, that the court on appeal could not render judgment for the full value of the property, but must reverse the judgment and order a new trial. *Brockman v. Buell*, 90.
5. The Court of Common Pleas, on reversing the final order of a district court in summary proceedings, has power, under sections 2260 and 3213 of the Code of Civil Procedure, to order a new trial. *Moench v. Yung*, 143.
 6. No appeal lies to the Court of Common Pleas from an order of the City Court of New York either granting or denying a motion for a new trial upon the ground of newly discovered evidence. *Smith v. Pryor*, 169.
 7. No appeal lies to the Court of Common Pleas from an order of the City Court of New York refusing a new trial for alleged misdirection to the jury, unless an exception thereto has been taken upon the trial. *Ib.*
 8. A deposit of \$100 in lieu of the undertaking in the sum of \$500 required by section 1326 of the Code of Civil Procedure on appeal from the City Court, is inadequate, as section 1306 requires that a deposit in lieu of an undertaking shall be equal to the amount for which the undertaking is required to be given; but in such case opportunity will be given appellant to perfect the appeal. *Lane v. Humbert*, 186.
 9. Upon an objection urged by appellant to the exclusion, when offered in evidence by him, of a written contract between respondents and a third party, it appeared that the clause of the contract relied on by appellant was read in evidence, on the cross-examination of one of the respondents, and he was examined in regard thereto, and the facts were thus brought before the court and jury. *Held*, that the exclusion of the contract itself was not injurious to appellant. *Claffy v. O'Brien*, 204.
 10. In an action for work and materials, the answer denied that the work was done or the materials furnished at the time alleged in the complaint, and set up the statute of limitations. *Held*, that as the sale and delivery of the goods, and their value, as well as the value of the services rendered, were thereby admitted, permitting plaintiff, in testifying to the items thereof, to look at a bill which he had presented to defendant years before and which he testified he had made within a month after the transaction, even if error, was not injurious to defendant. *Coffey v. Lyons*, 207.
 11. The admission of such bill in evidence, against a general objection to it as incompetent, immaterial, and irrelevant, was not error, as the items were not disputed, and the date borne by the paper made it material, as bearing on the statute of limitations, to establish when the work was done; and it was competent for that purpose. *Ib.*
 12. A written contract between third parties, offered in evidence by defendants, was excluded, but one of the defendants in testifying was allowed to refer to and refresh his memory from it, and plaintiff subsequently withdrew all objections to its admission and an opportunity to introduce it in evidence was given defendants, which they refused. *Held*, that any error in originally excluding it was cured. *Flanagan v. Mitchell*, 223.
 13. In an action for an accounting, defendants set up a counterclaim. An interlocutory judgment for plaintiff, rendered before any evidence had been given in regard to the counterclaim, contained a clause dismissing the counterclaim. *Held*, on affirming the judgment on appeal, that such clause should be stricken from it, and defendants be allowed to litigate their counterclaim upon the accounting. *Springer v. Bien*, 275.
 14. An order of the General Term of the City Court of New York affirming a judgment of that court is not an "actual determination," from which an appeal may be taken to this court, under section 8191 of

the Code of Civil Procedure; the appeal lies from the judgment entered in accordance with the directions of the order, not from the order. *Whitfield v. Broadway & S. A. R. Co.*, 288.

15. At the trial of an action against a railroad company for damages for the death of a person killed by an accident at a public street crossing of defendant's road, alleged to have been caused by neglect on the part of defendant's servants to give proper warning of an approaching train, flags, alleged to be similar to those used by defendant's flagman at the time, were offered by defendant as exhibits, with testimony relating to them. *Held*, that their exclusion was not error such as to entitle defendant to a new trial, as the flags were not the only evidence available to defendant for the purpose for which they were offered. *Quill v. New York Cent. & H. R. R. Co.*, 313.

16. Upon trial of an action on the pleadings, the sole question being the sufficiency of a defense of misjoinder of parties plaintiff set up by answer, judgment was rendered for plaintiffs. *Held*, on appeal therefrom, that, the decision being correct, the judgment would not be reversed merely to enable defendant to apply to the court below for leave to amend, as on trial of a demurrer; no request therefor having been made in the trial court. *Woarms v. Bauer*, 333.

17. Where, on the commencement of an action in a district court, an attachment is issued against defendant's property, error in issuing the attachment, or in refusing to set it aside on motion, is not ground for reversal of a judgment for plaintiff for the amount sued for with interest and costs, not including the marshal's fees on the attachment. *Schnauffer v. Catterbury*, 353.

18. An order of the General Term of the City Court of New York affirming an order denying a new trial cannot be reversed on appeal to the Court of Common Pleas on the ground that it is against the weight of evidence. *Arnstein v. Haulenbeek*, 382.

19. Error, if any, in excluding a question to a witness as to an indorsement of a pass-book, is cured by the subsequent admission of the book itself. *Ib.*

20. Where defect of parties is not pleaded, the exclusion of evidence that a person not a party to the action was a partner of plaintiff is not error. *Ib.*

21. The exclusion of evidence, corrected, if erroneous, by subsequent proof of the fact, is not ground for reversal. *Ib.*

22. A judgment cannot be reversed on the ground that a statement of the evidence in the charge of the court below was incorrect, where no request for a correction was made by appellant. *Ib.*

23. The entry of judgment by a plaintiff on a verdict in his favor, in order to appeal therefrom, is not such an adoption of the verdict as to estop the plaintiff from objecting to it for inadequacy of the damages. *Smith v. Dittman*, 427.

24. Under sections 3060, 3067, and 3068, subdivision 3, costs must be awarded to the respondent upon affirming on appeal a judgment of a district court of the City of New York; the provision of section 3213 gives discretion as to costs only where a judgment is modified or a new trial ordered. *Eisler v. Union Transfer & S. Co.*, 456.

See CONVERSION, 2.

DAMAGES.

GIFT.

PLEADING, 7.

PRINCIPAL AND AGENT, 6.

RAILWAYS, 1, 21-31.

REFERENCE, 1.

ARBITRATION.

A clause in a building contract that "should any dispute arise" respecting the terms of the contract or value of extra work, etc., the same should be settled by arbitrators to be selected by the owner and contractor, is not a bar to an action for extra work, where neither party made any effort to submit the controversy to arbitration. *Williams v. Shields*, 178.

ARREST.

See SUPPLEMENTARY PROCEEDINGS, 2, 3.

ASSIGNMENT.

1. In 1846, V. assigned a policy of insurance on his life to M., who at the same time agreed that the proceeds, when collected, should be applied to the liquidation of any liabilities of V. to M., any balance remaining to be paid to V's legal representatives. In 1851, on a settlement between them, M. abated nearly one half of the amount due him and accepted payment of the remainder and gave V. a discharge in writing "of all demands against him," nothing being said or done in regard to the policy. M. continued to pay the premiums until his death, in 1873, and his executors paid the next premium, after which the premiums were defrayed by the earnings of the policy itself. During this time, nothing was shown to have been done by V. concerning the policy; and in negotiations between him and M.'s executors in regard to his taking it, nothing was said about it being held as security for premiums. *Held*, that in the absence of any evidence of a change in the original agreement, it must be presumed to have continued, and that, after the death of V., his assignee of the policy was entitled to an accounting with respect to it from M.'s executors. *Schackelford v. Mitchell*, 268.
2. On such accounting, interest on the payments of premiums should not be computed with annual rests, although such was the usage and course of dealings between the parties until their settlement in 1851; there having been no mutual accounts between them after that time, and no accounts of the advances for premiums having been rendered on that basis. *Ib.*

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Where, by a lease, the rent of the demised premises is payable

monthly in advance, an assignee for the benefit of creditors of the lessee under an assignment executed after the first day of a month, who thereafter occupies the premises in carrying on the business of his trust, is not liable for the rent of such month or any part of it. *Anderson v. Hamilton*, 18.

2. Where the necessity for the employment of counsel by an assignee for benefit of creditors arises after he has filed his account, on objection by a creditor to the account, leave may be granted to him to submit to the court at special term proof by affidavit of the reasonableness of the counsel fee charged, to which affidavit objecting creditors should be permitted to reply. *Matter of Littell*, 379.
3. Under the provisions of chapter 503 of Laws of 1887 that, in all general assignments for benefit of creditors, any preference (other than for wages, etc.), shall not be valid except to the amount of one-third in value of the assigned estate left after deducting such wages, etc., and costs, etc., and should said one-third of the assets be insufficient to pay in full the preferred claims to which they were applicable, the said assets shall be applied to the payment of the same *pro rata*, where different classes of preferences are created by an assignment, the whole of such one-third of the net assets may be applied to the first preferred claim, although insufficient to pay such claim in full; as the only limitation intended by the act is the restriction of the quantity of the debtor's estate which he may apply to claims preferred by him. *Matter of Bryce*, 443.

See FACTORS, 1, 2.

ATTACHMENT.

1. Affidavits by defendant's book-keeper and others that defendant had left the state and his business, without leaving any one in charge, and by plaintiff that he had frequently inquired at defendant's place of business and was informed that defendant did not intend to return, will support an attach-

ment as against other creditors of defendant. *Deimel v. Scheveland*, 34.

2. On appeal from an order refusing to vacate and set aside an attachment and a judgment entered in the attachment suit, the court is not limited, in its inquiry into the validity of the proceedings, to the judgment roll, but may consider additional papers. *Ib.*

See APPEAL.

ATTORNEY AND CLIENT.

An agreement of settlement made by the attorneys in an action, with the full knowledge and consent of the parties, is binding as to matters in dispute, not embraced in the action, which are included in such agreement. *Carstens v. Schmalholz*, 28.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2.
FORECLOSURE, 3.
SHERIFFS, 2.

B

BAIL.

1. On an application to set aside a judgment on a forfeited recognizance, where it appears that the applicant is entitled to the relief asked, he will be allowed an order on the comptroller directing a repayment of the amount of the recognizance, but not of the costs of entering judgment; it appearing that the money was paid to the comptroller, though he produces no certificate to that effect from the comptroller. *People v. Goltze*, 62.
2. Judgment on a forfeited recognizance will be set aside, where the principal appeared on the return day, though after forfeiture of bail, and was found guilty on his confession, and paid the fine imposed, and the people have lost no rights and all costs have been paid. *People v. Madden*, 63.
3. A recognizance in the sum of \$2,000, entered into June 20th, was declared forfeited, for non-appearance of the principal, and execu-

tion was issued thereon July 26, and subsequently returned wholly unsatisfied. *Held*, that the forfeiture would not be remitted on payment of twenty per cent. of the amount, the principal never having been produced, both because the court had no power to entertain an application for a compromise of such a claim, and because of want of merits in favor of petitioner, the facts showing a fraud in entering into the recognizance or in subsequently secreting property. *People v. Rofrano*, 148.

4. A judgment entered on a forfeited recognizance cannot be vacated where it is not shown that the principal has either surrendered himself or been surrendered by his surety, or that the surety has made diligent efforts to secure and surrender him; nor unless the certificates of the district-attorney, that the people have lost no rights by reason of the failure of the surety to produce the principal, and of the sheriff, that all fees and charges have been paid, are presented. That the surety had no notice to produce the principal on the day when the recognizance was forfeited cannot avail; a party under recognizance may be called on any day during the continuance of the court. *People v. Kurtz*, 188.

BAILMENT.

One with whom a carriage has been left by the owner to be repaired, being at most a bailee for hire, cannot recover for injuries thereto caused by negligence of a third party. *Buddin v. Fortunato*, 195.

See PLEDGE.
WAREHOUSEMEN.

BENEVOLENT ASSOCIATIONS.

The secretary of a benevolent society, although not authorized by its constitution or by-laws to accept payment of dues from members, habitually received such dues, which he paid over to the society. *Held*, that the society was thereby estopped to deny his authority to accept dues tendered by a member, but refused by him on the ground of want of authority;

and that such tender was legally equivalent to payment, so as to render the society liable for the benefit payable on the death of such member, as a member "clear in the books" under its by-laws; he having died before any subsequent meeting of the society or its directors at which the dues might properly have been paid. *Roeding v. Sons of Moses*, 417.

BILLS AND NOTES.

1. A note made by a limited liability company to its own order and indorsed by it, and presented for discount by a director twenty days from its date, does not on its face suggest that it is accommodation paper, not that it is used for a dishonest purpose. *Chemical Nat. Bank v. Colwell*, 28.
2. It is no defense to an action against an indorser of a promissory note that the maker's or prior indorser's signature is a forgery, for he impliedly warrants the genuineness of such signature. *Arnson v. Abrahamson*, 72.
3. An order on defendants for the payment of a sum of money was accepted by them by writing thereon "Accepted, payable out of" a specified payment. *Held*, that this was a conditional acceptance, which became absolute when they received the payment referred to. *Flanagan v. Mitchell*, 223.
4. In an action by the payee of such order against the acceptors, the former testified that he took the order in payment for work done on a certain building, on defendants' promise to accept it, if he would not file a lien on the building, and that in reliance thereon he forbore to file a lien. *Held*, that such forbearance was a sufficient consideration to bind defendants, although they received nothing for their acceptance. *Ib.*

See CORPORATIONS, 2.

BONA FIDE PURCHASERS.

See CHATTEL MORTGAGES, 5.

BONDS.

See MECHANIC'S LIEN, 7, 8.
SHERIFFS.

BOUGHT AND SOLD NOTES.

See SALE, 8.

BREACH OF PROMISE OF MARRIAGE.

Although, in an action for breach of promise of marriage, evidence showing defendant's financial condition is material, testimony by plaintiff to declarations by defendant that he was the only heir of his uncle, who would leave a large estate to him, and that she heard that he was a very rich man, is not admissible. *Totten v. Read*, 282.

BROKERS.

1. A real estate broker cannot maintain an action against the purchaser he obtained, for commissions alleged to have been lost through the fraud and deceit of such purchaser in representing another person as the procuring cause, to whom the owner was thereby induced to pay such commissions. Plaintiff's right of action against the owner is in no way lost by such payment. *Cohen v. Hershfield*, 96.
2. In an action to recover broker's commissions for procuring a purchaser for real estate, affirmative proof of the pecuniary responsibility of the proposed purchaser is not necessary to entitle plaintiff to recover, where defendant accepted such purchaser. *Krahner v. Heilman*, 132.
3. It is not essential, to entitle a real estate broker to commissions, that he should have procured a purchaser upon the precise terms named by the principal at the time of employment. If, through the instrumentality of the broker, the buyer and seller meet and negotiations are thus opened up between them, which, continuing without withdrawal of either party therefrom, culminate in a sale, though for a

less sum than originally demanded and upon terms deviating from those at first fixed by the principal, the broker is entitled to his commissions. *Levy v. Coogan*, 137.

4. In an action by a real estate broker to recover commissions, the deed from defendant, containing an admission of the receipt of a certain sum as the purchase price, is competent evidence by plaintiff to prove the fact of sale, and the sum at which made and the amount of plaintiff's commissions. The consideration named in the contract of sale between defendant and the purchaser is not conclusive upon plaintiff. *Id.*

5. A broker holding stock as partial security for a debt, with the right to sell it at any time to protect himself, is not legally obligated to sell and realize upon it before bringing action or counterclaiming upon the debt, where the debtor has not directed a sale. *Mattern v. Sage*, 142.

6. Under an agreement by defendant to pay plaintiff commissions on sales by plaintiff of defendant's goods, plaintiff cannot recover commissions on sales to the customers previously procured by him while in defendant's employ, without proof that such sales were made by him. The fact that the entries in defendant's books of the sales to such customers were marked with plaintiff's initials, such marks being made by defendant's bookkeepers for their convenience in making up plaintiff's accounts, and not by defendant's order, is not sufficient proof that the sales were made by plaintiff. *O'Neill v. Howe*, 181.

7. Before offering at public auction a lease of property of the City of New York, pursuant to law, the comptroller of the city, having charge of the matter, desired to obtain a reasonable offer of an upset bid for the lease. Plaintiff, a broker, procured several persons to make such offers, among them defendant, who, plaintiff testified, agreed to pay him a commission if he would assist in obtaining the property. Plaintiff negotiated with the comptroller as to the price, and a proposal by defendant

was finally made and reduced to writing, to take the lease at a certain rental, provided no one bid higher at the auction, and that defendant would pay brokerage; and defendant afterwards became the purchaser at the auction sale. *Held*, that the written proposal, with plaintiff's testimony, if believed by the jury, established a sufficient consideration for a promise by defendant to pay brokerage; and that a verdict finding such a contract or an employment of plaintiff should be sustained, although defendant testified that he did not agree to pay brokerage, and that the clause as to brokerage was only inserted in the proposal to save the city from any claim therefor. *Myers v. Dean*, 251.

8. Such contract was not void as against public policy, as it did not appear that plaintiff undertook to keep away other bidders, or that he in fact did so. *Id.*

See CONVERSION, 2.
DISCOVERY, 1-3.
SALE, 5.

BURDEN OF PROOF.

See ALIMONY.
EVIDENCE, 6.

BY-LAWS.

See CORPORATIONS, 1, 5, 6.

C

CARRIERS.

1. In an action against a street railroad company for injuries received in attempting to enter its horse-car, plaintiff and his wife testified that he had signaled to the driver and the car had come to a full stop, but suddenly started as he was stepping on the platform, throwing him down and injuring him. Other witnesses for plaintiff testified that the car had not stopped, but had slackened its speed so that any person could enter it without risk. Defendant's witnesses testi-

fied that it had neither stopped nor slackened its speed, but was moving at an ordinary rate. *Held*, that motions to dismiss the complaint and to direct a verdict for defendant were properly denied; the questions of defendant's negligence and plaintiff's contributory negligence were for the jury. *Seitz v. Dry Dock, E. B., & B. R. Co.*, 264.

2. Attempting to get on the rear platform of a street car, after signalling the driver to stop, and after the car has slowed up, so that it is reasonably safe to do so, is not negligence contributing to an injury received in so doing, caused by a sudden starting and change of motion of the car. *Ib.*

CASES CRITICISED.

Erkenbrach v. Erkenbrach, 96 N. Y. 456, reported as a proceeding in the Supreme Court; stated to have arisen in the Court of Common Pleas, in *Anderson v. Cullen*, 15.

Ford v. Union Nat. Bank, 13 Weekly Dig. 352, as to liability of bank for honoring check of depositor against account kept by him as agent; stated to be meagrely reported, and explained in *Gerard v. McCormick*, 40, 45.

Fritze v. Pultz, 2 Civ. Pro. Rep. 142, as to effect of irregularity in attachment proceedings in district court, as ground for reversal of judgment on appeal; explained and disapproved in *Schnauffer v. Catterbury*, 354.

Herme v. Bembow, 4 Taunt. 764, as to non-liability of tenant at will, or from year to year, for waste; the English rule stated not to have been followed in New York, in *Regan v. Luthy*, 413.

Lang v. Marks, 3 Civ. Pro. Rep. 287, as to effects of error in attachment proceedings in district courts, as ground for reversal of judgment on appeal; stated to have been disapproved in *Rosenthal v. Grouse*, 7 Civ. Pro. Rep. 135, in *Schnauffer v. Catterbury*, 354.

CHATTEL MORTGAGES.

1. A chattel mortgage given to secure a sum of money payable one day after its date, is a mortgage payable on demand, and the commencement of an action to recover possession of the mortgaged property is a sufficient demand. *Brockman v. Buell*, 90.
2. In an action to recover possession of chattels mortgaged to plaintiff, consisting of a horse valued at \$200, and harness and blankets valued at \$50, the evidence as to value was uncontradicted, but the court awarded judgment for \$40 only. *Held*, that the court on appeal could not render judgment for the full value of the property, but must reverse the judgment, and order a new trial. *Ib.*
3. Defendant, being indebted to plaintiff for rent, executed to him a chattel mortgage of his household goods on the demised premises. Defendant subsequently abandoned the premises and the goods, and plaintiff took possession thereof. *Held*, that his taking possession and caring for the goods did not constitute a conversion thereof, or an appropriation of them in satisfaction of the mortgage debt. *Lathers v. Hunt*, 135, 349.
4. A mortgage of chattels, given at the time of an agreement to purchase them, to secure payment of the price, although it includes articles not in existence, but to be afterwards manufactured and delivered by the mortgagee, is valid and operative between the parties, and its lien attaches to such articles as are delivered. *Deeley v. Dwight*, 300.
5. G., having agreed to procure and furnish to D., one of the defendants, certain machinery, obtained payment therefor in full from D. by representations as to the condition of the machinery. He afterwards engaged plaintiffs to manufacture a portion of it, and gave them his note and a chattel mortgage thereon to secure payment of the price. Plaintiffs made and delivered such portion of the machinery to G., who delivered it to

D., and D. and the other defendants made considerable expenditures in setting it up in their factory. Plaintiffs did not file their mortgage for more than a year afterwards. It did not appear that plaintiffs knew of the arrangement and transactions between G. and D., although they knew that the machinery was to be put up at defendant's factory. *Held*, that defendants were not subsequent purchasers in good faith, within the meaning of the statute making chattel mortgages void as against subsequent purchasers and mortgagees in good faith, unless filed as prescribed therein (Laws 1883 c. 279 § 1); and that, G. having made default in payment of the price, plaintiffs, having demanded the machinery from defendants, could maintain an action against them for unlawful detention thereof. *Ib.*

6. At a sale by auction of personal property under a power in a mortgage thereof, defendant became the purchaser on a bid of \$325, after other bids, up to \$320, had been made. It did not appear that such bids were not made in good faith. The real value of the property was about \$400. *Held*, that defendant could not object to the fairness of the sale, because of a secret agreement between him and the mortgagee that he should pay \$325 for the property, and that no one else should get it. *Gross v. Jancsok*, 346.

7. Defendant refused to complete the purchase, and told the mortgagee to sell the property to some one else, and was thereupon told that he would be held liable for any loss on such resale. The property was then readvertised once, and sold without further notice to defendant. *Held*, that the finding of a jury that defendant had reasonable and proper notice of the resale would not be disturbed on appeal, no fraud or bias being shown. *Ib.*

8. Where a mortgagor of chattels, after default in payment of the mortgage debt, making the mortgagee's title and right to immediate possession absolute, stores the goods with a warehousemen, without the knowledge or assent of the

mortgagee, the warehouseman has no lien on the goods for his storage charges as against the mortgagee. *Baumunn v. Post*, 385; *Eisler v. Union Transfer & S. Co.*, 456.

See REPLEVIN.

WAREHOUSEMEN, 3-6.

CITY COURT OF NEW YORK.

A six days summons issued in an attachment suit in the city court of New York, instead of a ten days summons, as required by subdivision 2 of section 3165 of the Code of Civil Procedure in case of service of the summons by publication, is not an absolute nullity, and may be amended, under section 723, after publication commenced, and after thirty days from the issue of the warrant, though the summons was not issued until the order for publication was made. *Deimel v. Scheveland*, 34.

See APPEAL, 6, 7, 14, 18.

COMMISSION.

See DEPOSITIONS.
STATUTES.

COMMISSIONS.

See BROKERS.
CONTRACTS, 4, 6, 7.
FACTORS.

COMPROMISE.

An agreement of settlement made by the attorneys in an action, with the full knowledge and consent of the parties, is binding as to matters in dispute, not embraced in the action, which are included in such agreement. *Carstens v. Chumholz*, 26.

CONTRACTS.

1. A provision in a contract to build a house that the work shall be completed by a certain time and paid for on completion, does not make time of the essence of the contract, and is waived where alterations are made in the plans by mutual assent, or where, after the expli-

- ration of the time, the owner notifies the contractor to complete the work. *Close v. Clark*, 91.
2. A clause in a building contract that "should any dispute arise" respecting the terms of the contract or value of extra work, etc., the same should be settled by arbitrators to be selected by the owner and contractor, is not a bar to an action for extra work, where neither party made any effort to submit the controversy to arbitration. *Williams v. Shields*, 178.
 3. The provision in a contract for railroad construction that the work shall be executed and performed under the direction of the chief engineer or his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work performed shall be determined, does not prevent an appeal to the courts in case of fraudulent or unjust conduct of the engineer; and in such case testimony of other experts is allowable. *Byron v. Bell*, 198.
 4. Defendant agreed with plaintiff, that if the latter would use his influence to secure for defendant a contract with one D. to do certain work, defendant would pay plaintiff for such services ten per cent. of the price fixed by the contract for the work. *Held*, that, it appearing that plaintiff rendered such services, he was entitled to the agreed compensation therefor, on the making of the contract between defendant and D.; it was not material whether such contract was secured through the influence of plaintiff. *Hume v. George C. Flint Co.*, 360.
 5. An agreement in writing, dated November 27th, 1888, was by its terms "to take place and effect December 1st, 1888, for one year." *Held*, that it was not within the statute of frauds, as an agreement which by its terms was not to be performed within one year "from the making thereof," and was therefore not invalid, although not subscribed by the parties to be charged therewith. *Blake v. Voight*, 398.
 6. Defendants, having agreed to pay plaintiff commissions on consignments of goods to them for sale "influenced" by him, for one year, terminated the contract, pursuant to a condition therein, before the end of the year. *Held*, that plaintiff was entitled to commissions on goods consigned and received before such termination of the agreement, although not then sold. *Ib.*
 7. Defendants, in the progress of the business, had paid plaintiff on separate consignments. *Held*, that, having thus treated the contract as severable, they could not defeat his action for other commissions by setting up that the contract was entire. *Ib.*
 8. The facts that a contract was made by one of the parties to it under a name containing the designation "& Co.," not representing an actual partner, and that such party carries on business under that name in violation of section 363 of the Penal Code, are not a defense to an action by such party on the contract, unless credit was given to him and reliance placed on such false designation. *Barron v. Yost*, 441.
 9. A writing purporting to express an agreement on the part of plaintiff to advertise a book which defendants were about to publish, and stating the compensation therefor, was signed on behalf of plaintiff and delivered to defendants by plaintiff's agent, but was not signed by defendants and did not purport to bind them. *Held*, that, in an action by plaintiff against defendants for breach of the contract, parol evidence was admissible for plaintiff to prove the terms of the undertaking of defendants, upon the faith of which plaintiff agreed as in the writing indicated. *Tocci v. Arata*, 494.
 10. Several manufacturers of wire-cloth entered into an agreement for the avowed object of regulating the price of that commodity, whereby they constituted themselves an association, and engaged not to sell at less than certain specified prices, under a heavy penalty, the amount of which was deposited by each of the members, to be forfeited upon a violation by such member of the obligation, and to

be divided equally among the other members, such violation to be determined and forfeiture declared by the association. *Held*, that the agreement was void as against public policy, both because it tended to restrict competition in trade and to arbitrarily enhance the price of a commodity of commerce, and because it created the association a tribunal to adjudicate upon alleged violations of its own rules and to decree forfeitures therefor, constituted of the persons who would benefit by the forfeiture; and the courts would not aid one of the members to reclaim such deposit so declared forfeited and divided among the others. *De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.*, 529.

See BROKERS, 7, 8.
CORPORATIONS, 1, 5.
DAMAGES, 2, 4.
EVIDENCE, 8.
INJUNCTION.
LANDLORD AND TENANT.
LIMITATION OF ACTIONS, 1.
MASTER AND SERVANT.
MECHANIC'S LIEN, 1, 2, 6.
NEGLIGENCE, 3.
PARTNERSHIP.
PLEADING, 8, 9.
SALE, 7.
SUNDAY.
WAREHOUSEMEN.

CONVERSION.

1. Plaintiff delivered furniture to defendant under a contract to make certain repairs thereto. *Held*, that after waiting a reasonable time for such repairs to be made, she was not bound, as a condition precedent to a demand, to tender the money that would have become due if defendant had performed his contract; and that plaintiff could maintain an action for conversion against defendant alleging no superior right to possession. *Phillips v. McNab*, 150.
2. Plaintiff, in an action for conversion of the proceeds of a note, testified that defendant, a broker, had sold the note for him, and received part of the proceeds in cash, which plaintiff had demanded, and defendant had refused to pay over. Defendant gave evidence tending

to prove payment in full, and that he was plaintiff's banker, and had paid out the proceeds of the note on checks drawn by plaintiff; and also introduced in evidence a letter from plaintiff in which he spoke of keeping an account with defendant and leaving money on deposit with him. *Held*, that although this went far to corroborate defendant, there was no such preponderance of evidence as to authorize a reversal of a judgment on a verdict for plaintiff. *Darrah v. Boys*, 209.

See LANDLORD AND TENANT, 4, 6.

CORPORATIONS.

1. A by-law of a limited liability company providing that the president shall make, sign, and execute all contracts in the name of the company, makes him general agent of the company, with power to transact all business that the company could lawfully do, and implies the power to make such negotiable paper as is necessary or convenient in the business of the company, notwithstanding another by-law declares that all notes shall be signed by the treasurer; the by-laws being contradictory in other particulars. *Chemical Nat. Bank v. Colwell*, 28.
2. A note made by a limited liability company to its own order and indorsed by it, and presented for discount by a director twenty days from its date, does not on its face suggest that it is accommodation paper, nor that it is used for a dishonest purpose. *Ib.*
3. Defendant, on executing an assignment in blank of all his stock in a limited liability company, of which he was director, to another director, told the latter that he severed all his connection with the company and would have nothing further to do with it. *Held*, that such declaration, not accompanied with any request to communicate it to the board of directors, was not a valid resignation. *Ib.*
4. Before the transfer of defendant's stock was made on the books of the company, he consented to retain five shares, on the suggestion that

it would be bad policy for him to leave the company entirely, and a new certificate for such five shares was issued to him. *Held*, that he had not ceased to be a director under the requirements of section 10 of the limited liability companies act of 1875, that "directors shall be stockholders to the extent of at least five shares." *Ib.*

5. Defendant corporation was managed by three trustees, its sole stockholders, two of whom were president and treasurer respectively. A by-law provided that all contracts involving a liability of the corporation for \$500 or more must be in writing, executed by both president and treasurer, and attested by the seal of the company. *Held*, that no recovery could be had on a written lease to it of premises for eight months at an annual rental of \$900 payable monthly in advance, which was signed by the president only, and was not under seal, and which the treasurer expressly refused to sign, where the premises were never occupied. *Bohm v. V. Loewer's Gambrinus Brewery Co.*, 80.

6. A certificate of incorporation was duly issued to residents of New York, under the statutes of West Virginia, which provided that, from the date of such a certificate, the incorporators named shall "be a corporation by the name and for the purposes and business therein specified." The business specified was thereafter conducted by them in the usual methods. *Held*, that subsequent irregularities of action and failure to comply with requirements of statutes of West Virginia, especially with a provision that every director must be a resident of that state, unless otherwise provided by a by-law, no such by-law being shown, did not render the incorporation nugatory, so that the stockholders might be treated as partners and as such liable for personal injuries caused in the prosecution of the business of the company. *Demarest v. Flack*, 337.

See DISCOVERY.
PAYMENT.
SALE, 5.

COSTS.

1. An action commenced in a district court and removed to the Court of Common Pleas is not an action "brought" in a court of record, within the meaning of section 3268 of the Code of Civil Procedure, allowing defendant to require security for costs from a non-resident plaintiff. *Hames v. Judd*, 110.
2. But while defendant cannot require security for costs, the court may require it, under section 889 of the Code, as a condition of allowing plaintiff a commission to take testimony abroad; and such a condition is reasonable where plaintiffs have delayed their application without apparent cause, and their recovery is doubtful. *Ib.*
3. Under sections 3060, 3067, and 3066, subdivision 3, costs must be awarded to the respondent upon affirming on appeal a judgment of a district court in the City of New York; the provision of section 3213 gives discretion as to costs only where a judgment is modified or a new trial ordered. *Eisler v. Union Transfer & S. Co.*, 456.

See APPEAL, 8.
FORECLOSURE, 4.

COUNTERCLAIM.

See APPEAL, 13.

D

DAMAGES.

1. In an action for personal injuries to plaintiff, shown to have been of the most serious character, entailing confinement to the house and to his bed for a long period, great suffering of body and anxiety of mind, expensive surgical treatment, besides ordinary attendance of physicians, and the amputation of a large portion of one of his feet, the jury found a verdict for plaintiff for \$11,000. *Held*, that the judgment thereon should not be reversed, simply because plaintiff was advanced in years. *Jordan v. New York & H. R. Co.*, 130.

2. A boiler company, having contracted to deliver certain boilers at a fixed time, ordered of defendant tubes to be used in making the boilers, and plaintiff, with knowledge of the circumstances, contracted with defendant to weld heads on the tubes. Plaintiff "sweated" in the heads, instead of welding them, and defendant, in consequence, to prevent a breach of its contract, was compelled to deliver the boilers without the tubes, plugging up the holes in which the tubes were to be inserted, and to procure other tubes and insert them at such times as they could when the boilers were not in use. *Held*, that the extra expenses thereby incurred by defendant were the natural consequences of plaintiff's breach of contract, and were properly allowed as damages therefor. *Eagle Tube Co. v. Edward Barr Co.*, 212.

3. In an action for personal injuries, the amount of the bills paid by plaintiff for services of physicians on account of his injuries is admissible in evidence without proof of the value of the services. *Morseman v. Manhattan R. Co.*, 249.

4. A lease contained a covenant by the lessor to furnish the lessee with "six-horse steam power and live steam daily as required," for the business of book-binding, to be carried on by the lessee on the demised premises. *Held*, that the lessee could not recover thereon, as damages by reason of insufficiency in the supply of steam, the value of materials rendered worthless by using his stamping-machines when the steam supply was inadequate; nor the amount of wages paid to employes when forced to remain idle for the same reason; it not appearing that he made any effort to supply the steam himself, or that he was prevented from filling any contracts for book-binding. *Russell v. Giblin*, 258.

5. In an action for personal injuries, it appeared that plaintiff had been prevented thereby from pursuing his ordinary occupation for several weeks, but there was no evidence of the value of his earnings. *Held*, that as he was entitled nevertheless to nominal damages therefor, it was not error to instruct the

jury that they might take into consideration his loss of earnings; there being no specific request for an instruction that the recovery therefor should be limited to nominal damages. *Seitz v. Dry Dock, E. B. & B. R. Co.*, 264.

6. In an action for personal injuries to plaintiff, a woman, from being struck on the head by a bale of cloth, by reason of negligence on the part of defendants, the evidence was that the blow had caused great pain and marked prostration, continuing to the time of the trial, more than three years after the injury, so that during that time plaintiff had suffered incessant and excruciating pain, and had been unable to rise from a recumbent position, and was not able to sit up, and had lost much flesh and become very weak; that her injuries were permanent, and it was reasonably certain that her condition would not improve; that, at the time of the injury, she was 20 years of age and in good health; that her expenses on account of the injury amounted to about \$3,000, and her loss of earnings to \$4 a week. The jury found a verdict for plaintiff for \$1,000. *Held*, that it should be set aside as inadequate. *Smith v. Dittman*, 427.

See APPEAL, 23.
LANDLORD AND TENANT,
12, 13.
RAILWAYS.

DEATH.

See EVIDENCE, 3.
PARTNERSHIP, 2.
RAILWAYS, 9, 11.

DECEIT.

See BROKERS, 1.
PLEADING, 3.

DEEDS.

See ACKNOWLEDGMENT.
BROKERS, 4.
RAILWAYS, 18.

DEFAULT.

See DISTRICT COURT, 2, 3.

DELIVERY.

See ACKNOWLEDGMENT.

DEMAND.

See CHATTEL MORTGAGES, 1.
CONVERSION, 1.

DEPOSITIONS.

In a case removed from a district Court to the Court of Common Pleas, while defendant cannot require security for costs from a non resident plaintiff, the court may require it, under section 889 of the Code of Civil Procedure, as a condition of allowing plaintiff a commission to take testimony abroad; and such a condition is reasonable where plaintiffs have delayed their application without apparent cause, and their recovery is doubtful. *Hames v. Judd*, 110.

See STATUTES, 1.

DISCOVERY.

1. In an action to recover margins paid defendant corporation as a broker in transactions in oil, plaintiff alleging that no purchases or sales were in fact made, where the relation between the parties is that of principal and agent, defendant doing the business on commission, plaintiff will be allowed an order for the examination of defendant's officers and an inspection of its books before trial. Plaintiff is entitled to know whether or not the transaction claimed by his agent in fact took place. *Talbot v. Doran & Wright Co.*, 174.
2. Where, in such case, it is sought to examine the principal officers of the corporation, plaintiff need not allege that such officers have knowledge of the corporation's transactions; that will be presumed. *Ib.*
3. If the books of the corporation are necessary to enable the officers of

the corporation to testify as to plaintiff's account, their production will be compelled. *Ib.*

4. In an action against an insurance company, on an alleged contract by it to pay plaintiff commissions on premiums on policies of insurance procured by him while formerly an agent of defendant, on application by him for a discovery and inspection of defendant's books, it appeared that such discovery was sought only to enable him to prove the amount of his damages; that he had himself kept books of his agency; and that defendant had offered to give him a statement of the facts desired as to any policy actually procured by him, if he would furnish the name of the insured; and the good faith of the application was seriously questioned, and was not satisfactorily shown. *Held*, that the application should be denied. *Perls v. Metropolitan Life Ins. Co.*, 255.

DISMISSAL OF COMPLAINT.

See CARRIERS.
MUNICIPAL CORPORATIONS,
2.
NEGLIGENCE, 9.
RAILWAYS, 32.
SLANDER.

DISTRICT COURT.

1. An action commenced in a district court and removed to the court of Common Pleas is not an action "brought" in a court of record, within the meaning of section 3268 of the Code of Civil Procedure, allowing defendant to require security for costs from a non-resident plaintiff. *Hames v. Judd*, 110.
2. In an action in a district court an adjournment was taken in order to allow defendant to produce his sureties to justify on an undertaking offered for a removal of the cause, but he failed to appear on the adjourned day, and his default was taken. Subsequently the default was vacated and defendant permitted to defend on depositing the amount of plaintiff's claim and costs with

the court and signing a stipulation to that effect, and the case was thereafter adjourned several times. *Held*, that defendant by his stipulation and the subsequent proceedings waived his right to a removal. *Krahner v. Hielman*, 132.

3. After entry of a judgment in a district court by default, defendant moved to set it aside on the ground that the summons had not been served on him. *Held*, that plaintiff, having given the proof of personal service, on which the judgment was entered, was estopped to object to the jurisdiction of the justice to set aside the judgment, under section 1367 of the Consolidation Act (Laws 1882 c. 410), providing that a justice may, on motion, set aside any default made in any action tried before or by him; and that the inquest taken on such proof was a trial, within the meaning of that provision. *Edel v. McCone*, 216.

See APPEAL, 17, 24.
COSTS, 1.

DIVORCE.

1. A husband is not liable for necessities furnished his wife after she has obtained a limited divorce, though the decree does not award her alimony; especially where the person furnishing the necessities had knowledge of the proceedings for divorce, and did not give credit to the husband. *Anderson v. Cullen*, 15.
2. Under the amendment of 1887 to section 831 of the Code of Civil Procedure, making a party to an action for divorce, charged with the commission of adultery, competent as a witness on his own behalf to disprove the charge, such a party is not limited to a bare denial, but may testify to any facts or circumstances tending to disprove the facts and circumstances advanced to support the charge, or to avoid the inferences to be drawn therefrom. *Steffens v. Steffens*, 363.
3. Since that amendment, the force of the reason requiring corroboration

of the alleged paramour's testimony has been considerably weakened, and the sufficiency of such testimony must now depend mainly upon the degree of credibility a judge or jury sees fit to attach to it. *Ib.*

4. In an action against a wife for divorce on the ground of her adultery, the alleged paramour testified to sexual intercourse with her in open fields in the night time. This was denied by her. There was no testimony that they were seen, at or about the times stated by him, in or near the fields mentioned, nor was there proof of any amorous conduct between them, or of a criminal attachment on her part for him, as her conduct with him, shown by the evidence, although it might appear suspicious and improper, was capable of an innocent interpretation; evidence, also, offered by way of corroboration, as showing undue familiarities by her with others, tended only to show indiscreet acts by her, not amounting to proof of criminality, or rested solely on surmises of her servants, or on their testimony to admissions by her to them of attachment for another, which she denied; and the testimony of the paramour was in itself full of improbabilities, and the referee, in finding for defendant, placed his disbelief thereof not only on its inherent improbability, but on the manner and conduct of the witness while under examination. *Held*, that such finding should be sustained. *Ib.*

See ALIMONY.

E

EASEMENTS.

See RAILWAYS, 1-10, 17-32.

ESTOPPEL.

- A judgment for plaintiff in an action to recover for goods sold for a liquor store, will not be reversed where there is evidence that defendants owned the saloon, and after their alleged sale to another permitted their firm name to be continued without any indication

of change of ownership. *Dreher v. Connolly*, 108.

EVIDENCE.

1. The payment by a sheriff of a fee to his counsel for defending an action creates a legal presumption, in a subsequent action by the sheriff against his indemnitors, that it was a fair and reasonable charge, which is conclusive unless defendants allege and prove that it is unreasonable. *Grant v. Tefft*, 49.
2. In an action, tried before a referee, for the conversion of a horse, levied upon and sold by defendants as the property of plaintiff's husband, who used it in his business, testimony by plaintiff's attorney that he lent plaintiff money upon her statement that she needed it for the payment for a horse, is not admissible. *Schwab v. Heindel*, 164.
3. The provision of section 830 of the Code of Civil Procedure that, where a party has died since the trial of an action, his testimony at "the former trial" may be given in evidence at a new trial, applies to testimony at any former trial, and not merely that taken at the last preceding trial, where there have been more than one. *Koehler v. Scheider*, 235.
4. In an action for personal injuries, the amount of the bills paid by plaintiff for services of physicians on account of his injuries is admissible in evidence without proof of the value of the services. *Morseman v. Manhattan R. Co.*, 249.
5. Although letters written by one person are not admissible to prove his agency for another, they may be competent against the latter as part of the *res gestæ*, where they relate to the matter in controversy, and the agency is otherwise proved. *Lathers v. Hunt*, 349.
6. Defendant was employed by plaintiffs as bookkeeper and cashier, it being his duty to receive payment of money and turn it over to them and enter the receipt thereof in their books. In an action

by them against him for the amount of such a payment received by him and alleged not to have been paid over, he admitted that he had received the money, and that no entry thereof had been made in their books. *Held*, that this was sufficient, even as against the presumption of his innocence, to cast on him the burden of proving that the money actually came to the possession or custody of plaintiffs. *Shook v. Lyon*, 420.

7. In an action for personal injuries to plaintiff by defendants' negligence, exclamations of pain by plaintiff, immediately after the injury, are admissible in evidence. *Smith v. Dittman*, 427.
8. A writing signed by one only of the parties to an agreement, and purporting to contain his obligation only, not undertaking to bind the other party, is merely an admission of the engagement of the party signing it, and does not preclude him from showing by parol what was the undertaking on the part of the other party. *Curtis v. Soltau*, 490; *Tocci v. Arata*, 494; *Wise v. Rosenblatt*, 496.

See ALIMONY.

APPEAL, 9-11, 18, 21.
 BREACH OF PROMISE OF MARRIAGE.
 BROKERS, 2, 4, 6.
 CONTRACTS, 9.
 CONVERSION, 2.
 DIVORCE, 2-4.
 GIFT.
 LANDLORD AND TENANT, 11, 12.
 LIMITATION OF ACTIONS, 2-4.
 MASTER AND SERVANT, 2, 3.
 MUNICIPAL CORPORATIONS, 2.
 NEGLIGENCE, 1, 2, 6, 7, 9.
 PARTNERSHIP, 1, 3.
 PLEADING, 8, 9.
 PRINCIPAL AND AGENT, 4-6.
 RAILWAYS, 2, 3, 8, 12, 16, 18, 19, 21, 23.
 RECEIPTS.
 SALE, 4, 7, 8.
 STATUTES.
 WILLS, 3, 4.
 WITNESSES.

EXECUTION.

1. Where a sale of goods has been procured by false and fraudulent representations of the purchaser, the seller may recover them, on proof of the fraud, from a sheriff who has levied on them as the property of the purchaser. *Lewis v. Flack*, 240.
2. On motion to set aside levies and sales under executions, on the ground that the name by which defendant was designated in the proceedings, judgments, and executions, was not his real name, it appeared that he was equally well known by either name. *Held*, that although that fact was not alleged in the original actions, the executions were not void, as there was no misnomer. *Isaacs v. Mintz*, 468.

See SHERIFFS.

SUPPLEMENTARY PROCEEDINGS.

EXECUTORS AND ADMINISTRATORS.

See ACTION.

PARTNERSHIP, 2.

EXPERTS.

See CONTRACTS, 3.

WITNESSES, 2-4.

F**FACTORS.**

1. The compensation agreed to be paid by a principal to factors for selling goods and guaranteeing payment was a commission on the sales, a certain part of which was for guaranteeing prompt payment by the purchasers. *Held*, that such *del credere* commission was earned when the guaranty was made. *Springville Manuf. Co. v. Lincoln*, 818.
2. By the agreement for consignment of the goods, the proceeds of the sales were to be remitted "from time to time;" but the factors neglected to remit promptly such pro-

ceeds collected by them, and, becoming insolvent, made an assignment for benefit of their creditors. *Held*, that their failure to remit was not equivalent to embezzlement, and did not deprive them of their right to commissions; but that the principal was entitled, as against the assignee, to have such commissions set off against the amount due from the factors. *Ib.*

3. By the agreement for consignment of goods for sale to factors, who were to guarantee prompt payment of the amount of all sales made by them, all sales and entries relative thereto were to be kept by the factors in separate books, and they were to collect the accounts and remit the same upon the respective dates of maturity, such remittances to be made daily, unless the amounts received were less than \$1,000, and payments made before maturity were to be remitted, less discount for anticipation of payment; and the factor's charges and commissions were to be paid by the principal within six days of receipt of bills for the same. *Held*, that the factors were entitled to commissions only on proceeds actually remitted. *Hockanum Co. v. Lincoln*, 325.

FALSE IMPRISONMENT.

See MALICIOUS PROSECUTION.

FALSE REPRESENTATIONS.

See BROKERS, 1.

SALE, 3.

FORCIBLE ENTRY AND DETAINER.

Plaintiff, claiming title to a store under a bill of sale executed by a former owner thereof, since deceased, brought summary proceedings to recover possession of it, against the deceased owner's sister, who was deceased's next of kin, and against her son. It appeared that the mother had refused to send her son to open the store for plaintiff, and had said that any one who attempted to go into the store by force would be arrested; and that the

son had been employed in the store by such former owner until his death, and thereafter, having no knowledge of plaintiff's title, had entered the premises by means of a key given him by deceased, in order to care for the property; and then, discovering that plaintiff had entered the premises, he had placed a padlock on the door to protect the property; and there was nothing more to show detainer by him, except a mere refusal to give plaintiff the key or to open the premises. *Held*, that as no violence or threats, tending directly to create a breach of the peace, were shown, there was no forcible entry or forcible detainer for which summary proceedings could be maintained under Code Civ. Pro., § 2233. *Carter v. Anderson*, 437.

FORECLOSURE.

1. The answer in an action to foreclose a purchase money mortgage did not deny the allegations of the complaint, but alleged that plaintiff's conveyance of the premises to defendant was by a full covenant warranty deed, and that there was outstanding a paramount title to part of the premises; but it admitted that defendant had entered into possession; and there was no claim that she had been evicted or disturbed, or that plaintiff was not wholly solvent. *Held*, that the answer should be stricken out as frivolous; the question of title could not be tried in such an action. *Seidman v. Getz*, 434.
2. As the provision of the Code limiting the lien of a judgment on real estate to ten years (Code Civ. Pro., § 1251) makes no distinction between lands still owned by the judgment debtor and lands conveyed to others or incumbered by other liens, judgments over ten years old are not liens on surplus moneys arising on a foreclosure sale of land of the judgment debtor. The provision for levying execution on the debtor's real estate after ten years (Code Civ. Pro., § 1252) does not extend the original lien of the judgment. *Floyd v. Clark*, 528.
3. Upon distribution of surplus

moneys arising on a foreclosure sale of land, a claim by an attorney to a certain sum as payable for his professional services out of a judgment which is a lien on the land, may properly be left to be enforced by action. *Ib.*

4. The costs to be allowed on the proceeding to determine the disposition of such surplus moneys are motion costs and disbursements only. *Ib.*

See CHATTEL MORTGAGES, 6, 7.
MECHANIC'S LIEN, 2, 5, 7.
ORDERS.

FORFEITURES.

See CONTRACTS, 10.
INSURANCE, 2, 3.

FORGERY.

See BILLS AND NOTES, 2.

FRAUD.

See BROKERS, 1.
PLEADING, 3, 6.
SALE, 3.

G

GIFT.

At the trial before a referee of an action for money in a savings bank, claimed by plaintiff as a gift to her by her uncle, since deceased, made by him in expectation of death, plaintiff's husband testified that deceased, having had the bank books brought to him, gave them to plaintiff, saying, "You keep them. They are for you;" and that he said he thought he was going to die, and he wanted everything that was there to belong to her. This was corroborated by plaintiff, so far as she could testify, as well as by testimony of another witness to declarations of deceased, and by plaintiff's possession of the bank books and other circumstances; while against it was only negative evidence as to matters not in themselves very material. *Held*, that the referee was not justified in disregarding the husband's testimony as improbable, and that, as the

words testified to by him were sufficiently definite to create a gift of the bank accounts, a judgment on the report of the referee in favor of defendant should be reversed. *Devlin v. Farmer*, 98.

GUARANTY.

Pending negotiations between plaintiff and insurance companies for the adjustment and payment of a loss by damage to plaintiff's goods by fire, defendant, an "insurance wrecker," orally contracted to purchase damaged goods of plaintiff, for a certain sum, which he agreed to pay to the various insurance companies in certain proportions, they to pay the same to plaintiff with an additional sum as damages. *Held*, that such contract was not within the statute of frauds, as an agreement to answer for the debt, default, or miscarriage of another. *Goodman v. Cohen*, 47.

See RECEIPTS.

H

HUSBAND AND WIFE.

1. An action will not lie against a husband to recover for moneys loaned his wife to buy necessities. *Anderson v. Cullen*, 15.
2. A husband is not liable for necessities furnished his wife after she has obtained a limited divorce, though the decree does not award her alimony; especially where the person furnishing the necessities had knowledge of the proceedings for divorce, and did not give credit to the husband. *Id.*

See ALIMONY.
DIVORCE.

I

IMPRISONED DEBTORS.

Schedules filed with the petition of an insolvent debtor for a discharge from his debts, in stating, as required by section 2162 of the Code of Civil Procedure, the place of residence of each creditor, gave the

names of streets and house numbers only, not specifying any city, town, or village. *Held*, that it could not be assumed that streets of the same names in the city of New York were intended, there being nothing in the schedules to indicate that to be the fact; that, in view of the provision of section 2165 of the Code of Civil Procedure for publication of the order to show cause for a longer period if any of the creditors reside at a distance of more than 100 miles than if all reside within that distance, the period for publication could not be determined; and, the jurisdiction being special, and depending on strict compliance with statutory requirements, the proceedings must be dismissed. *Matter of Cohen*, 69.

INJUNCTION.

Plaintiff, an author of experience and familiar with the art of constructing plays, having suggested to defendant C. that a novel written by C. could be successfully dramatized, C. wrote to plaintiff that he wished plaintiff would dramatize the work, if he would take one-half or two-thirds of the proceeds, and asked whether he should send plaintiff a copy of the book; plaintiff answered that he would be pleased to undertake the dramatization of it, and asked C. to send a copy of the book; and C. replied that he had ordered a copy sent to plaintiff. Several months afterwards, plaintiff read or gave to C. the first act of his play; and plaintiff testified that C. expressed himself as pleased, and directed plaintiff to go on and complete it; and, although this was denied by C., he did not suggest that he instructed plaintiff to abandon it. Their testimony as to subsequent communications between them was conflicting; but it appeared that when C., two years after his first proposition to plaintiff, arranged with defendant R. to prepare a dramatization of the same work, he suggested to R. collaboration with plaintiff. This R. declined, and prepared a dramatization of the novel, which was produced on the stage by defendant F., as manager, under an arrangement between C., R., and F. *Held*, that the proposi-

tion by C. and acceptance by plaintiff constituted a contract; that the lapse of time between the making of it and the arrangement with R. did not affect plaintiff's rights under it, time not being essential; that as plaintiff had no adequate remedy at law for the breach of it, and as a specific performance by C. was shown to be possible, although the court could not practically enforce performance, injunction was the proper remedy, to compel C. either to carry out his contract or lose all benefit from it; and that, it appearing that the other defendants had notice of plaintiff's rights, they should all be restrained from the performance of any dramatization of the book by any person other than plaintiff. *House v. Clemens*, 3.

See RAILWAYS, 1, 4, 9, 17, 21-32.

INSPECTION.

See DISCOVERY.

INSURANCE.

1. Plaintiff's goods, insured against loss through collapse of building, were injured by the fall of a wall of the building in consequence of his landlord's excavating on an adjoining lot, and he brought action against the landlord therefor. The action was settled on payment of a certain sum, and a release under seal was given against all claims or demands whatsoever. *Held*, that such release barred a subsequent action by plaintiff on his insurance policy to recover any part of such loss, as it destroyed the right of subrogation of the company. *Dilling v. Draemel*, 104.
2. A policy insuring against fire property while contained in a certain dwelling, stipulated that no officer, agent, or other representative of the insurance company should have power to waive or be deemed or held to have waived the provisions and conditions of the policy unless such waiver should be written upon or attached to the policy. The insured delivered the policy to an agent of the company to procure its consent, required by the policy, to a removal of the in-

sured property, and the agent returned it to him without indorsement or other writing of any kind, informing him that all proper formalities had been complied with, and that the policy would cover the property in its new location; and the insured thereafter removed the property. *Held*, that the insurance was forfeited. *Hill v. London Assur. Corp.*, 120.

3. A policy of insurance against fire expressly provided that, in case of loss, the insurance company might cause investigation and appraisal to be made without being deemed to have waived any forfeiture. *Held*, that, after a fire, a reference of the matter to an adjuster for investigation and appraisal did not waive a forfeiture. *Ib.*

See ASSIGNMENT.

BENEVOLENT ASSOCIATIONS.

DISCOVERY, 4.

GUARANTY.

SUPPLEMENTARY PROCEEDINGS, 1.

INTEREST.

See ASSIGNMENT.

J

JOINT LIABILITY.

See JUDGMENT, 2.

JUDGE.

See ORDERS.

JUDGMENT.

1. In an action to restrain the defendants from using a certain name and trademark, and for an accounting for moneys collected under that name, the judgment was for that relief only; but among the findings of fact was a finding that the plaintiffs had employed one of the defendants to sell plaintiffs' goods on a certain commission, as to which there was no issue of fact. *Held*, that such finding was immaterial, and not *res judicata* against such defendant, as to the terms of his employment, in a subsequent action by him against the plaintiffs. *Springer v. Bien*, 275.

2. In an action against H. and T. on a joint liability, H. made default, and judgment was rendered against T. on trial by a referee; but the plaintiff entered a several judgment against each of them. Subsequently the plaintiff assigned to L. its judgment so entered against T., with all its claims against T. individually, expressly reserving its rights against the joint property of T. and H. and the individual property of H. L., afterwards, as owner of the claims of the plaintiff against T. and H., executed a release thereof to H.; and thereafter the plaintiff assigned to L. all its claim against the joint property of T. and H. The plaintiff having afterwards issued execution on the judgment against H., he brought suit to restrain its collection, claiming that he was discharged by the release of L., on the ground that the judgment should be regarded, in equity, as joint. *Held*, that he could not complain that the plaintiff therein sought to take advantage of the fact that it was too late to correct the error in the entry of the judgment. *Whittemore v. Judd L. & S. Oil Co.*, 290.

3. Towards the end of the trial of such action to restrain enforcement of the execution, a motion was made to amend the complaint so that L., who was a party defendant, might be compelled personally to indemnify H. if payment of the judgment should be enforced. *Held*, that this was properly refused, as such amendment would introduce a cause of action which was not consistent with the original cause of action, and as to which, being a cause of action for damages for fraud or deceit, L. would be entitled to a trial by jury. *Ib.*

See APPEAL, 23.

DISTRICT COURT, 2, 3.

FORECLOSURE, 2.

MASTER AND SERVANT, 8.

L

LACHES.

See INJUNCTION.

LANDLORD AND TENANT.

1. Where, by a lease, the rent of the demised premises is payable monthly in advance, an assignee for the benefit of creditors of the lessee under an assignment executed after the first day of a month, who thereafter occupies the premises in carrying on the business of his trust, is not liable for the rent of such month or any part of it. *Anderson v. Hamilton*, 18.

2. In an action to recover the rent of premises on an alleged holding over under a year's lease, which expired May 1st, 1889, there was evidence that all defendants' machinery was taken out of the premises before such date, and that April 30th and May 1st were legal holidays, and that, on May 2d, by reason of a civic procession in the street, defendants were not able to cross it with their trucks, but that at such times there were only some broken boards on the premises. *Held*, that the question of a holding over should have been submitted to the jury, and that it was error to direct a verdict for plaintiff. *Hammond v. Eckhardt*, 113.

3. On the day defendant was to take possession of plaintiff's premises under a written lease for a term of years, plaintiff destroyed the lease and refused possession, but subsequently, on the same day, said he had changed his mind, and he let defendant into possession, saying he would prepare a new lease similar to the other. Several months thereafter he tendered a lease unlike the one destroyed, which defendant refused to sign, and no other lease was ever made. *Held*, that plaintiff, in an action under the latter lease, could not recover upon the lease destroyed for the rent of any part of the term after the premises were abandoned by defendant. *Harft v. Tonnelli*, 115.

4. Defendant, being indebted to plaintiff for rent, executed to him a chattel mortgage of his household goods on the demised premises. Defendant subsequently abandoned the premises and the goods, and plaintiff took possession thereof. *Held*, that his taking possession of and caring for the goods did not

- constitute a conversion thereof, or an appropriation of them in satisfaction of the mortgage debt. *Lathers v. Hunt*, 135, 349.
5. In an action for the rent, defendant set up such taking of the property as a defense. *Held*, that plaintiff should be permitted to show that he never used it himself or allowed others to use it, and had never reaped any advantage from its possession. *Ib.*
 6. Even if there had been a conversion or appropriation of the property by plaintiff, he would only be chargeable with its value at the time, there being no evidence that he took it in full satisfaction; and, therefore, the exclusion of evidence of such value was error. *Ib.*
 7. Defendant took possession of plaintiff's premises under an oral understanding that if the premises were put in a certain order she would stay for a long time, the rent being payable monthly in advance. *Held*, under the statute relating to renting in New York City, that this created a tenancy until May 1st following. *Spies v. Voss*, 171.
 8. A re-entry and re-letting by the landlord, after the premises are abandoned and the key returned by the tenant, do not, without further proof, establish a surrender and acceptance. *Ib.*
 9. Where demised premises are injured by negligent blasting, the lessee may recover damages for repairs made by him, necessary to protect his property or to make the premises tenantable after the injury; it not appearing that the landlord was bound by any covenant to keep the building in repair. *Budin v. Fortunato*, 195.
 10. Notice by a landlord to a tenant to vacate the demised premises, "on or before" the day on which the tenancy expires, is not a continuing offer to accept a surrender by the tenant at any time before that day. *Koehler v. Scheider*, 235.
 11. By an interlineation in a lease it was expressly provided that all repairs were to be made by the lessee, except those to the exterior of the building; but the lease contained no provision as to who should make repairs to the exterior. *Held*, that evidence of a collateral agreement, by which the landlord was to keep the exterior in repair, was admissible. *Weil v. Kahn*, 286.
 12. An agreement by a lessor, before or at the time of making a written lease, and as a condition on which the lessee hired the premises, that they should be put in thorough repair before the commencement of the term, being collateral to the lease, may be proved and enforced although not reduced to writing nor incorporated in the lease. *Clenighan v. McFarland*, 402.
 13. The amount paid by the lessee for rooms and meals at a hotel for the time that the premises were untenable, while the repairs were in progress during the term, is not recoverable by him as damages for breach of such agreement; the measure of his damages is the value of the use of the premises during the time they were so rendered untenable. *Ib.*
 14. A tenant of a house from year to year removed therefrom before the expiration of the year, and securely closed the premises, but, within a few days thereafter, the plumbing work was cut out and stolen by persons unknown. *Held*, that this was commissive waste, for which the tenant was liable to the landlord, although the act of strangers. *Regan v. Luthy*, 413.
 15. An owner of two adjoining buildings is not liable to the tenant of one of them under a lease from him, for injuries to the tenant's goods caused by the removal of the walls of the other building, leaving the demised premises exposed, where the lease contains no covenant to repair or keep in repair, or that the adjacent property should remain in the same condition as at the time of hiring, and there was no deceit or false representations as to the condition of the demised premises; and where the work was done under a contract with the owner giving the contractor sole charge of the work, and providing that the walls of the demised prem-

ises should not be disturbed, and it appears that no injury to the tenant or invasion of his premises was contemplated in making the contract or was necessarily involved in doing the work under it. *Rotter v. Goerlitz*, 484.

See DAMAGES, 4.
RAILWAYS, 20, 25, 29.
SUMMARY PROCEEDINGS.

LIEN.

See CHATTEL MORTGAGES, 4, 5, 8.
FORECLOSURE, 2.
MECHANIC'S LIEN.
WAREHOUSEMEN.

LIFE ESTATES.

See REMAINDERS.

LIMITATION OF ACTIONS.

1. A stipulation, in a contract for employment, that no action shall be brought against the employer by reason of any matters arising thereunder after six months from the time of the termination of the employment, is authorized under section 414 of the Code of Civil Procedure, providing for a shorter limitation, by the written contract of the parties, than that prescribed by statute. *Better v. Prudential Ins. Co.*, 344.
2. Where defendant pleads the statute of limitations, a payment on account of the demand sued for may be proved by plaintiff, although not alleged in his complaint; he is not bound to anticipate the defense. *Ramsey v. Barnes*, 478.
3. Testimony that certain payments were made on account of the debt sued for, is not necessarily the conclusion or opinion of the witness; and, where given without objection or cross-examination as to the circumstances, is sufficient to take the case out of the statute of limitations. *Ib.*
4. To show that certain money paid by defendant to plaintiff was a payment on account of a debt due from the former to the latter, for

money loaned, taking it out of the operation of the statute of limitations, plaintiff testified that she asked defendant for money on account of the loan to pay her rent, and he drew a check for her; and her brother testified that defendant afterwards told him that he had paid the amount to plaintiff on account; but defendant testified that plaintiff made no request for a payment, but said she was in arrears for rent, and about to be dispossessed, and he gave her his check, which bore on its face the statement that it was for rent of her house. *Held*, that a finding that the payment was on account of the debt, and not a loan from defendant to plaintiff, was sustained by the evidence. *Ib.*

See RAILWAYS, 24.

M

MALICIOUS PROSECUTION.

A complaint, setting forth a cause of action for a malicious prosecution only, alleged that plaintiff was arrested therein under a warrant. At the trial it appeared, on cross-examination of defendant's witnesses, that the arrest was made without a warrant. *Held*, that granting leave to plaintiff to amend his complaint by adding a cause of action for false imprisonment, thereby introducing a new cause of action, was error, for which, though no exception thereto was taken, a judgment for plaintiff should be reversed. *Cumber v. Schoenfeld*, 454.

MARRIAGE.

See ALIMONY.
BREACH OF PROMISE OF
MARRIAGE.
DIVORCE.
HUSBAND AND WIFE.

MASTER AND SERVANT.

1. Under a requisition from the department of public works in New York city to "furnish and deliver to bureau of chief engineer, . . .

necessary labor, material, and take up and relay water mains, . . . to be done under direction and to the satisfaction of the chief engineer of the Croton aqueduct," defendant furnished men and materials for the work, and was reimbursed by the city for the materials and the wages of the men which he paid in the first instance. The men furnished were entirely under the control of the city's inspector, who was authorized to discharge such as were found incompetent, and who directed them as to time, place, and mode of doing the work, and the means to be employed. *Held*, that the relation of master and servant did not exist between defendant and the men employed, and for negligence in the performance of the work, resulting in an injury to a workman, defendant was not liable. *Beatty v. Thillemann*, 20.

2. The relation of employer and employe, under a contract for a definite term, having been once established in an action for salary, it will be presumed to have continued to the end of the term unless the contrary appear, and plaintiff, in order to recover, need not establish continuance by affirmative proof. *Berg v. Carroll*, 73.

3. Where the contract was for continuous employment under the direction of the employers, proof of an actual rendition of services is not necessary; a readiness to serve is all that is required; and an abandonment of the employment by the employers cannot be predicated upon their neglect to require actual services, unaccompanied by some affirmative act indicating a discharge or dismissal from service. *Ib.*

4. Under an agreement to render services to another as long as they are satisfactory to him, so long as the employe performs services for the employer, he is entitled to be paid therefor; but if he or his work is not satisfactory to the employer, the latter may at any time discharge him without subjecting himself to further claim. *Johnson v. Bindseil*, 232.

5. A stipulation, in a contract for

employment, that no action shall be brought by the employe against the employer until ten days after service on the latter of a written statement of the particulars and amount of the former's claim, is reasonable, and the employe cannot be relieved therefrom merely because he did not understand it when he entered into it. *Better v. Prudential Ins. Co.*, 344.

6. A stipulation, in such a contract, that no action shall be brought against the employer by reason of any matters arising thereunder after six months from the time of the termination of the employment, is authorized under section 414 of the Code of Civil Procedure, providing for a shorter limitation, by the written contract of the parties, than that prescribed by statute. *Ib.*

7. A contract for the employment of plaintiff by defendant, as teacher in a school of which defendant was proprietor, stated the terms and conditions of the employment in ten clauses, the sixth of which provided that, "without just cause of complaint on the part of" defendant, the engagement should be for one year, fixing the dates of commencement and termination thereof; and the tenth clause was, "monthly notice required of either party." The other clauses related exclusively to the services required of plaintiff, and the manner of paying his salary, and did not refer to any right of either party to terminate the employment before its expiration by lapse of time. *Held*, that the tenth clause should not be construed as reserving a right to determine the employment by giving a month's previous notice of election to do so, as such construction was not necessary to reconcile that clause with the sixth clause, and would require the interpolation of additional words. *Hannay v. Zerbun*, 372.

8. Plaintiff, while in the employ of defendant under a hiring for a year at a salary payable weekly, on the day before the expiration of a week, had an altercation with defendant's superintendent, during which he assumed that she resigned her employment; but this she, at the time, explicitly controverted. On

the next day, and several days following, she offered to do her work, but was not permitted to resume work. Her salary for that week not having been paid, she brought an action against defendant for "wages," in which defendant admitted an indebtedness of an amount less than the week's salary, and paid the sum into court; and, upon proof of the contract, the value of the services not being litigated, plaintiff recovered the amount of her salary for one week. *Held*, that the judgment was for wages due on the contract, and was not a bar to a subsequent action for breach of the contract by dismissing plaintiff. *Levin v. Standard Fashion Co.*, 404.

9. In such action for damages for dismissal, it appeared that defendant's superintendent had called plaintiff a thief; had accused her of lying, and shaken his fist at her; had used violent language to her; had laughed and jeered at her; had put her out of the office in which she worked; and had brought a policeman to stand guard over her. *Held*, that she was not bound to accept an offer of re-employment by defendant, and such offer was not available to reduce the damages; and plaintiff was not precluded from showing such reason for refusing the offer by the fact that, when it was made, she rejected it because not in accordance with the original contract. *Ib.*

10. By an agreement between plaintiff, an actress, and defendants, theatrical managers, plaintiff was to "render services at such theatres, opera-houses, and halls as required" by defendants, for a certain period, for which defendants were to pay her a weekly salary. During the term fixed by the agreement, defendants refused to continue the employment, because of plaintiff's refusal to attend at a rehearsal as directed. Plaintiff brought an action for damages for alleged wrongful dismissal, in which she sought to excuse her failure to attend the rehearsal on the ground that, when directed to do so, on the day preceding the rehearsal, she was physically exhausted; but it did not appear that, at the time of the re-

hearsal, she was physically unable to attend. *Held*, that the contract would not necessarily be terminated by a mere temporary disability of plaintiff; but that as no sufficient excuse for her non-attendance at the rehearsal was shown, a verdict in her favor could not be sustained. *Fisher v. Monroe*, 461.

MECHANIC'S LIEN.

1. A mechanic's lien is invalid where founded upon a notice of lien filed by a contractor for the unpaid balance of the whole contract price, which states that all the work and materials have been performed and furnished, when in fact part of the work was unperformed, and some of the materials not furnished. *Close v. Clark*, 91.

2. Under a general denial in an action to enforce a mechanic's lien, filed for the unpaid balance of a contract to furnish all the work and materials in a building, defendant may show that he furnished part of the materials or is liable as guarantor or surety for plaintiffs thereon. *Ib.*

3. Under the provisions of the mechanic's lien law of 1875, giving a lien on a house, etc., to persons performing work in erecting it, etc., "with the consent of the owner," and requiring that the notice of lien shall state "the name of the owner, lessee, general assignee, or person in possession of the premises, against whose interest a lien is claimed (Laws 1885 c. 342 §§ 1, 4) a notice which states the name of the owner, and that the labor and materials for which a lien is claimed were done and furnished with his consent, is sufficient, although it does not expressly state that the lien is claimed against his interest. *Ross v. Simon*, 159.

4. A statement in such notice of "the name of the owner of the leasehold against whose interest a lien is claimed," is not exclusive, and does not estop the lienor from claiming also a lien against the interest of the owner. *Ib.*

5. In a complaint to foreclose a mechanic's lien on a house, etc., for

work and materials, an allegation that the owner had full knowledge of the erecting, etc., of the buildings, and consented to the same, and to the performance of the labor and supplying of the materials by plaintiff, is a sufficient averment of "the consent of the owner," required by Laws 1885 c. 342 § 1, to create a lien against his interest, without alleging how or under what circumstances his consent was given. *Ib.*

6. By a contract for the erection of a building by S. for the owner, to be paid for in six instalments, the fifth instalment was to become due when certain specified work should be done. F. & B. contracted with S. to do part of the work, and plaintiffs contracted with F. & B. to do a part of their work, required to earn the fifth instalment. That work was done by them, with the owner's knowledge, and the fifth instalment, having become due, was paid by the owner to S., and S. paid to F. & B. the amount due to them. The next day F. & B. made an assignment. *Held*, that a mechanic's lien thereafter filed by plaintiffs could not be enforced, all that was due or to become due to F. & B. having been paid in good faith; as the statute expressly provides that the owner shall be liable to pay no greater sum than the price stipulated to be paid in the contract. *French v. Bauer*, 309.

7. Under the provision of the mechanic's lien act of 1885 for the discharge of a mechanic's lien on the filing of a bond "conditioned for the payment of any judgment which may be rendered against the property" (Laws 1885 c. 342 § 24 subd. 6), it is not necessary, in an action on such a bond, that the owner of the premises should be made a defendant, and a judgment of foreclosure and sale rendered; a recovery may be had on the bond if the plaintiff shows himself entitled under the act to a lien which, but for the filing of the bond, would be enforced against the property. *Copley v. Hay*, 446.

8. In an action to foreclose a mechanic's lien, in which the owner of the property was made a defendant, the complaint set forth a good cause of

action for such foreclosure, and also averred the filing by another defendant, one of the contractors for the building on which the lien was claimed, of "his bond for twice the amount of the plaintiffs' claim or lien herein." *Held*, that this did not show a discharge of the lien, under the provision above cited, which requires that the court shall fix or direct the amount of the bond and that the sureties shall be approved and an order made thereon by the court or judge discharging the lien; and that therefore a demurrer by the owner to the complaint, on the ground that it stated no cause of action as against her, was properly overruled. *Ib.*

MISJOINDER.

See APPEAL, 16.

MISNOMER.

On motion to set aside levies and sales under executions, on the ground that the name by which defendant was designated in the proceedings, judgments, and execution, was not his real name, it appeared that he was equally well known by either name. *Held*, that although that fact was not alleged in the original actions, the executions were not void, as there was no misnomer. *Isaacs v. Mintz*, 468.

MISTAKE.

See SALE, 6.

MORTGAGES.

See CHATTEL MORTGAGES.
FORECLOSURE.

MUNICIPAL CORPORATIONS.

1. A period of less than forty-eight hours between the time of a snow-fall and an accident due to a slippery street is not sufficient to charge the city with negligence in not causing the street to be cleared. *O'Connor v. Mayor, etc., of New York*, 58.

2. Plaintiff was injured by falling off a gang plank into an open stairway in landing from a boat on defendant city's dock. The maintenance of the stairway was necessary for landing passengers, and the dock was not defective or in a dangerous condition. In an action to recover for the injury there was no proof that the boat or gang plank was owned or furnished by defendant or operated by its servants. *Held*, that the complaint was properly dismissed. *Holland v. Mayor, etc., of New York*, 124.

N

NAMES.

See MISNOMER.

NEGLIGENCE.

- I. In an action for personal injuries, it appeared that plaintiff entered defendant's liquor store by the front entrance to make a purchase, and, attempting to depart by a side door which he had often used as a means of exit, fell into a cellar opening in front of such door, which was in use and uncovered, and was injured. Plaintiff testified that the door was unlocked, and that there was insufficient light to see the opening, while defendant offered evidence that the door was locked and bolted, and plaintiff was warned against its use, which plaintiff denied. *Held*, that the questions of negligence and contributory negligence were properly submitted to the jury. *James v. Ford*, 126.
2. The complaint alleged ownership of the premises by defendant, while the answer admitted that he occupied the premises and carried on business there. *Held*, that a failure to prove ownership was not a material variance. *Ib.*
3. One who has entered into a contract with a city to do blasting in a street, the work being intrinsically dangerous to others, is liable to any person injured by negligence in doing the work, even though it be negligence of a subcontractor with him therefor. *Buddie v. Fortunato*, 195.
4. Where demised premises are injured by negligent blasting, the lessee may recover damages for repairs made by him, necessary to protect his property or to make the premises tenantable after the injury; it not appearing that the landlord was bound by any covenant to keep the building in repair. *Ib.*
5. One with whom a carriage has been left by the owner to be repaired, being at most a bailee for hire, cannot recover for injuries thereto caused by negligence of a third party. *Ib.*
6. Plaintiff's intestate, having gone to defendant's apartment house to visit a servant of one of the tenants, entered an elevator used for carrying baggage and servants, in one side of which was a slide, movable up and down, for the purpose of taking on baggage. While the elevator was ascending, the intestate, through faintness or loss of consciousness, sank to the floor, and, the slide being up, fell through it, and her dead body was found at the bottom of the shaft. The only negligence alleged on the part of defendant was in leaving the slide open. *Held*, that the facts would not authorize a finding of negligence, the accident being not only unexampled, but one which, if it had not happened, would have seemed physically impossible. *Egan v. Berkshire Apart. Assoc'n*, 218.
7. The fall from an elevated railway of a crowbar, in use by an employe making repairs to the track, whereby a person in the street below was injured, raises a presumption of negligence, which is not overcome by proof that the crowbar was dropped through the efforts of the employe to save himself from falling. *Morsemann v. Manhattan R. Co.*, 249.
8. At the trial of an action against a railway company for injuries alleged to have been caused by negligence in repairing its tracks, the judge, in charging the jury, said:

"You must say whether the railroad company has used ordinary and reasonable care in performing this work upon its tracks. Has it neglected the precautions which reasonable and prudent people would have taken to prevent an accident similar to the one upon which you have to pass?" *Held*, that this was not objectionable as inviting the jury to make affirmative suggestions as to possible safeguards. *Ib.*

9. In an action against a street railroad company for injuries received in attempting to enter its horse-car, plaintiff and his wife testified that he had signaled to the driver, and the car had come to a full stop, but suddenly started as he was stepping on the platform, throwing him down and injuring him. Other witnesses for plaintiff testified that the car had not stopped, but had slackened its speed so that any person could enter it without risk. Defendant's witnesses testified that it had neither stopped nor slackened its speed, but was moving at an ordinary rate. *Held*, that motions to dismiss the complaint and to direct a verdict for defendant were properly denied; the questions of defendant's negligence and plaintiff's contributory negligence were for the jury. *Seitz v. Dry Dock, E. B., & B. R. Co.*, 284.

See CARRIERS.

LANDLORD AND TENANT, 15.
MASTER AND SERVANT, 1.
MUNICIPAL CORPORATIONS.
RAILWAYS, 11-15.

NEW TRIAL.

In an action to recover from defendant the amount of a check drawn by plaintiffs' agent, upon an account in which he kept funds of plaintiffs, to repay to defendant money loaned to the agent, the answer set up that the agent borrowed the money as agent of plaintiffs, and not individually, and the case was tried on that theory. *Held*, that newly discovered evidence to the effect that the check was in fact paid out of the individual funds of the agent, which he had deposited in his agent's account to meet such check, not being ger-

mane to the issues, was no ground for a new trial. *Gerard v. McCormick*, 40.

See APPEAL, 6, 7, 18.

NEW YORK CITY.

See BROKERS.

CITY COURT OF NEW YORK, 7, 8.
DISTRICT COURT.
LANDLORD AND TENANT, 7.
MASTER AND SERVANT, 1.
MUNICIPAL CORPORATIONS.

NOTICE.

See CHATTEL MORTGAGES, 7.
LANDLORD AND TENANT, 10.
MECHANIC'S LIEN, 1, 3, 4.
MUNICIPAL CORPORATIONS, 1.
REFERENCE, 2.

NUISANCE.

See RAILWAYS, 24.

O

ORDERS.

An order for service by publication in foreclosure proceedings bore the caption "At a Special Term," etc., and was made by the judge while actually on the bench in court, and was signed with his initials with the abbreviation, "Ent." It contained the usual impersonal recitals of a Special Term or "Court" order. *Held*, nevertheless, that it would be presumed, in favor of the regularity of the order, that it was the personal act of the judge, as a judge, as required by section 440 of the Code of Civil Procedure, and not as the embodiment of the court, in which case it would be nugatory. *Regan v. Traube*, 152.

See APPEAL, 14.

P

PARTIES.

See APPEAL, 16, 20.
DISCOVERY.
MISNOMER.
PARTNERSHIP, 2, 4.
RAILWAYS, 1, 4, 9, 17.
SUMMARY PROCEEDINGS, 2.

PARTNERSHIP.

1. In an action by an administratrix to establish a copartnership between her intestate and defendant, and for an accounting, it appeared that such a partnership had existed, but that prior to April 26th, 1874, the intestate had received from the partnership business an amount equal to his advances; it did not appear that after that date he took any part in the management or control of the business, or received any money on account of it, but defendant conducted it alone, and, from 1877, in partnership with another; between May 3d, 1874, and July 4th, 1879, the intestate borrowed small sums from defendant or said firm, which were not entered in the books of the business, except as a memorandum, until repaid; on October 1st, 1874, as an insurance broker, he procured insurance on the property of the business in the name of defendant, and October 1st, 1875, procured a renewal thereof, and October 1st, 1879, procured a policy in the name of the new firm, and afterwards rendered a bill to them therefor, and received and receipted payment. *Held*, that this was sufficient to sustain a finding that the partnership between him and defendant was dissolved on or before October 1st, 1874. *Rice v. Maddox*, 156.
2. Articles of copartnership contained an agreement that, in the event of the death of a certain one of the partners before the expiration of the term of the copartnership, his interest therein should survive to his personal representatives and the business should be continued by them and the other partner as copartners. During the term of the partnership, such partner died, leaving a will by which he directed his executors to carry out this agreement. *Held*, that the agreement was valid, and the defendant in an action for a debt due to the firm could not object that the executors were improperly joined as plaintiffs. *Woarns v. Bauer*, 333.
3. In an action against several defendants for personal injuries to plaintiff sustained on a toboggan slide, the only evidence that defendants

were jointly interested in operating the slide was testimony that the ground was let to one of them for a company as tenant; that another defendant paid for services rendered in the construction and operation of the slide, by checks as treasurer of the company; and that other defendants inspected toboggans and other goods, and ordered them sent to the slide. *Held*, that this was insufficient to charge defendants with liability as partners. *Demarest v. Flack*, 337.

4. The facts that a contract was made by one of the parties to it under a name containing the designation "& Co.," not representing an actual partner, and that such party carries on business under that name in violation of section 363 of the Penal Code, are not a defense to an action by such party on the contract, unless credit was given to him and reliance placed on the false designation. *Barron v. Yost*, 441.

See CORPORATIONS, 6.

PAYMENT.

L., the managing employe of a corporation, was indebted to defendant in the sum of \$50.75, while defendant was indebted to the corporation in the sum of \$59.63. Defendant tendered to L., at the company's office, \$50.75, and asked to have it credited on his account with the corporation, at the same time requesting L. to pay his indebtedness to defendant. L. took such money, counted it, and paid it back to defendant, at the same time crediting defendant's account with the corporation with such amount. *Held*, that on these facts the jury was justified in finding a payment of defendant's debt to the corporation. *Shailer v. Morgan*, 166.

See PRINCIPAL AND AGENT,
1, 2.

RECEIPTS.

SALE, 6.

WITNESSES, 4.

PENALTIES.

See CONTRACTS, 10.

PERSONAL INJURIES.

See DAMAGES, 1, 3, 5, 6.
EVIDENCE, 4, 7.
NEGLIGENCE, 1, 6-9.
PARTNERSHIP, 3.
WITNESSES, 2.

PLEADING.

1. In an action for personal injuries alleged to have been caused by the dangerous condition of certain premises, the complaint alleged ownership of the premises by defendant, while the answer admitted that he occupied the premises and carried on business there. *Held*, that a failure to prove ownership was not a material variance. *James v. Ford*, 126.
2. As a reply to an answer is required by section 514 of the Code of Civil Procedure only where a counterclaim is pleaded, new matter in an answer, not stating a counterclaim, is deemed controverted, and may be traversed or avoided in any way. *Springer v. Bien*, 275.
3. An action was brought by H., one of two joint debtors against whom separate judgments had been entered on their joint debt, seeking to restrain the collection of an execution issued against him thereon, on the ground that he had been discharged by a release executed to him by one L., to whom the judgment against the other joint debtor had been assigned by the creditor. At the trial, a motion was made for leave to amend the complaint, so that L., who was a party defendant, might be compelled to indemnify H. if payment of the judgment should be enforced. *Held*, that this was properly refused, as such amendment would introduce a cause of action which was not consistent with the original cause of action, and as to which, being a cause of action for damages for fraud or deceit, L. would be entitled to a trial by jury. *Whittemore v. Judd L. & S. Oil Co.*, 290.
4. An order granting leave to serve a supplemental complaint and allowing defendant a certain time thereafter to answer, is not erroneous because it fails to provide for a

demurrer; as a demurrer to a supplemental complaint is not authorized by the Code. *Myers v. Metropolitan El. R. Co.*, 410.

5. In granting leave to serve a supplemental complaint, the case having been on the calendar more than a year, it is within the discretion of the court to provide that the case shall retain its original date of issue, its number on the calendar, and its position on the day calendar. *Id.*
6. Allegations of fraud made in a pleading on information and belief, without a statement of facts on which such belief is founded, are insufficient. *Seidman v. Geib*, 484.
7. A complaint, setting forth a cause of action for a malicious prosecution only, alleged that plaintiff was arrested therein under a warrant. At the trial it appeared, on cross-examination of defendant's witnesses, that the arrest was made without a warrant. *Held*, that granting leave to plaintiff to amend his complaint by adding a cause of action for false imprisonment, thereby introducing a new cause of action, was error, for which, though no exception thereto was taken, a judgment for plaintiff should be reversed. *Cumber v. Schoenfeld*, 454.
8. In an action by the indorsee of a promissory note signed "G. B., per R. B., Atty.," brought against R. B. for a balance due on the note, the complaint contained a paragraph alleging that it was agreed between plaintiff and defendant "that the matter was not one of G. B., but a personal one of the defendant," and that he owed plaintiff a specified sum, and that that was the true balance due upon said note. The only denial in the answer of these allegations referred expressly to said paragraph of the complaint, and denied the precise words of all its averments except the statement of the personal obligation of defendant, to which no reference was made. *Held*, that this was, in effect, an express admission of that allegation; and that no question of the consideration for such agreement, or other question affecting its validity, could

be raised. *Ramsay v. Barnes*, 478.

9. The force of such admission was not destroyed by proof of a writing made by defendant, reciting that he had purchased the note, and that said sum was the balance due on the purchase; such writing not being signed by defendant and not enforceable against him as an agreement. *Id.*

See FORCLOSURE, 1.
JUDGMENT, 2, 3.
LIMITATION OF ACTIONS, 2.
MECHANIC'S LIEN, 2, 5.
NEGLIGENCE, 2.
REPLEVIN.
SALE, 2, 4.

PLEDGE.

1. A broker holding stock as partial security for a debt, with the right to sell it at any time to protect himself, is not legally obligated to sell and realize upon it before bringing action or counterclaiming upon the debt, where the debtor has not directed a sale. *Mattern v. Sage*, 142.
2. Where a pledgee, although having, by the indorsement and delivery to him of a warehouse receipt for the goods pledged, the right to the exclusive and absolute control thereof, does not claim or exercise that right, if the pledgor, having free access to the goods, and knowing that they are in danger of damage, does nothing to preserve them or to make the damage as little as possible, though having opportunity to do so, he cannot hold the pledgee responsible for the loss thereby caused. *Willetts v. Hatch*, 828.

PRACTICE.

See APPEAL.
COSTS.
EVIDENCE.
EXECUTION.
JUDGMENT.
LIMITATION OF ACTIONS.
PARTIES.
PLEADING.
REFERENCE.
REPLEVIN.
TRIAL.
WITNESSES.

PRESUMPTIONS.

See ACKNOWLEDGMENT.
EVIDENCE, 6.
MASTER AND SERVANT, 2.
NEGLIGENCE, 7.
ORDERS.
RAILWAYS, 18.
SHERIFFS, 2.

PRINCIPAL AND AGENT.

1. Plaintiffs' agent in the collection of rents of their buildings, known as the "Glass Buildings," borrowed money of defendant for his individual use, and gave his individual property as security. He paid such loan with a check signed with his name followed by "Agent Glass Buildings." *Held*, that this signature was sufficient to put defendant upon inquiry as to whether the check was drawn upon funds of plaintiffs. *Gerard v. McCormick*, 40.
2. The action to recover the amount of such check from defendant was tried upon the theory that the loan was made to plaintiffs' agent, as agent, and not individually. *Held*, that newly discovered evidence to the effect that the check was in fact paid out of the individual funds of the agent, which he had deposited in his agent's account to meet such check, not being germane to the issues, was no ground for a new trial. *Id.*
3. Although letters written by one person are not admissible to prove his agency for another, they may be competent against the latter as part of the *res gestæ*, where they relate to the matter in controversy, and the agency is otherwise proved. *Lathers v. Hunt*, 349.
4. Defendant was a foreign corporation, having an office in the City of New York, in charge of H. as manager. Plaintiff, seeking employment, on a reply received to his answer to an advertisement, called at said office, and was received by H., and referred by him to M., who entertained plaintiff's application, drew up a paper for him to sign, to be sent to the home office for approval, and engaged him in the meantime at a weekly salary, and

demanding from him a deposit of money as security for the faithful discharge of his duty, which plaintiff paid. His application was not sent to or approved by the home office. *Held*, that it was not a defense to an action by him against the company for the salary agreed on and the deposit, that M. had no authority to hire others for the company, and that H. had authority only to receive applications for employment, and to hire such applicants as were approved by the company, as plaintiff did not know of this limitation of H.'s authority, which, as between them, was apparently general. *Berresch v. John Hancock Mut. Life Ins. Co.*, 394.

5. In such action, H., called as a witness by defendant to show the course of business at the office, the restrictions on his authority, etc., testified that he was manager of the company. He was not contradicted, and there was other evidence of similar action by him in other instances. *Held*, that this was sufficient proof of his agency. *Ib.*

6. The claim on which plaintiff brought suit against defendant for money received, arose out of transactions of plaintiff with one K., in a stock-brokerage business carried on by K. in part of a drinking saloon of which defendant was proprietor. It was conceded that K. acted as defendant's agent in the first of such transactions with plaintiff, but defendant testified that, before the later transactions, an arrangement was made between him and K. that the latter should carry on the business on his own account, and K. testified that he told plaintiff of the change; but plaintiff denied this and denied that he knew of any change in the business, although changes were made in the signs, etc., by inserting K's name. There was some evidence that these changes were but a cover, and were not made in good faith. *Held*, that as the question whether such changes were made as to put plaintiff on inquiry was a mixed question of law and fact, the judgment of the trial justice in favor of plaintiff would not be disturbed on appeal. *Lines v. Shepard*, 471.

See BROKERS.
DISCOVERY.
EVIDENCE, 5, 6.
FACTORS.
PAYMENT.

PUBLIC POLICY.

See CONTRACTS, 10.
WAREHOUSEMEN, 6.

Q

QUESTIONS OF LAW AND FACT.

See CARRIERS.
LANDLORD AND TENANT,
2.
NEGLIGENCE, 1, 8, 9.
PLEADING, 3.

R

RAILWAYS.

1. In actions against three elevated railroad companies, as joint defendants, for damages to plaintiffs' real property from the construction, maintenance, and operation of an elevated railroad in the street in front thereof, and for injunctions restraining defendants, the court found that one of the defendants had not taken any part in the construction, maintenance, or operation of such railroad, negating the allegations of the complaint as to such defendant; and it was not alleged that such railroad company threatened or intended to take any part in the maintenance or operation of said railroad. *Held*, that judgments against all the defendants must be reversed as to said railroad company. *Thompson v. Manhattan R. Co.*, 64.

2. In such an action, the admission of evidence on the part of plaintiffs of the value of the premises without the location of the road, is not ground of reversal where similar evidence was admitted on defendants' part. *Ib.*

3. The rejection of evidence of a witness as to what he paid for rent of premises in the neighborhood is

- not error, where it was not shown under what circumstances he occupied the premises, or why the landlord was induced to receive such amount as rent for the premises. *Ib.*
4. Remaindermen may maintain an action in equity to restrain the maintenance of an elevated road in the street in front of the premises in possession of the life tenant, and for damages for the injury to the inheritance. And in ascertaining their damages, the damages to the whole fee may be apportioned between the life tenant and remaindermen according to the annuity tables. *Ib.*
 5. Between 1868 and 1870 the property in question rented for \$5,350 per annum; in 1870-71, when partly occupied, for \$3,350; in 1871-76 for \$4,250; in 1876-77, being the year immediately preceding the construction of defendants' road, for \$3,900; and since then for about \$3,000. *Held*, that an allowance of \$25,000 damages was excessive and should be reduced to \$15,000. *Ib.*
 6. Plaintiff owned a lot running through from a street on which defendant's elevated railroad was constructed to another parallel street. On both ends of the lot were buildings fronting on their respective streets and wholly disconnected. *Held*, in an action for damages from the construction and operation of the road, that the allowance of damages for the rear structure was erroneous. *Mooney v. New York El. R. Co.*, 145.
 7. Where a decrease in rental value of premises is due in part to a change in the business character of the neighborhood, it is error to allow, as damages to such premises from the construction and operation of an elevated railroad, the whole difference in value before and after the construction of the road. *Ib.*
 8. Defendants in such an action cannot object to the refusal of the court to allow evidence of the decline in rents of the neighboring property, where evidence of the same character offered by plaintiff has been excluded on defendants' objection. *Ib.*
 9. Plaintiff in an action for an injunction against the maintenance of an elevated railroad in the street in front of his premises, and for damages therefrom, having deceased, the action was revived in the name of his devisee and executrix. *Held*, that, it being an equitable action, and the question of damages being merely incidental and alternative, defendants were not entitled to a jury trial as to past damages claimed for loss of rentals before the death of the original plaintiff. *Sanders v. New York El. R. Co.*, 261.
 10. A finding of fact, on trial by the court of such action, relating to damage by smoke, steam, gas, and cinders, of which there was proof, included a statement that grease, oil, and water were allowed to drop from passing trains, of which there was no evidence. *Held*, that, no motion to amend the findings having been made, and it appearing that the error had no influence on the result, it might be disregarded as surplusage. *Ib.*
 11. While plaintiff's intestate was standing near the most westerly of the four tracks of defendant's railroad, at a public street crossing, that track being in use for the storage of cars, not for the passage of trains, a train, backing on another track, struck a cart crossing the tracks in a westerly direction, throwing the cart forward on him and inflicting injuries which caused his death. *Held*, that in an action therefor, a refusal to charge that, if the negligence of the driver of the cart caused the accident, plaintiff could not recover, was not error; and that a charge that there could be no recovery if the accident was caused exclusively by the negligence of the driver of the cart was proper. *Quill v. New York Cent. & H. R. Co.*, 313.
 12. Nor was it error to decline to instruct the jury that the fact that it did not appear that, at any time previous, an accident had occurred at that place, must be taken as conclusive proof of the sufficiency of the provision made by defend-

- ant by stationing flagmen there to warn persons of approaching danger. *Ib.*
13. It was proper to charge that, if a sudden and instinctive effort on the part of the driver of the cart to escape impending danger after receiving warning thereof resulted in the accident, there not being sufficient time to form an intelligent and deliberate judgment as to the best means of escape, negligence was not imputable to him. *Ib.*
14. Under the circumstances, contributory negligence could not be imputed to deceased, as matter of law, merely because he remained within or partly within the rails of the westerly track at the time of the approach of the train; whether he used proper care was a question for the jury. *Ib.*
15. The mere statement of the judge in his charge that the crossing was a dangerous one did not amount to a misdirection, he having left all essential facts to be determined by the jury, and no specific request having been made that that fact be submitted to them. *Ib.*
16. The exclusion of flags, offered as exhibits, alleged to be similar to the one used by the flagman at the time of the accident, and of testimony relating to them, was not error such as to entitle defendant to a new trial, such flags not being the only means available to defendant for the purpose for which they were offered. *Ib.*
17. One who acquires title to land abutting on a public street, after an elevated railroad is built and in full operation on such street, may maintain an action to restrain the maintenance and operation of the railroad and for damages for injuries therefrom to easements in the street, appurtenant to the land. *Werfelman v. Manhattan R. Co.*, 855.
18. It is not necessary, in such action, that plaintiff should connect himself, by a continuous chain of deeds, with the persons seized of the premises at the time of the building of the railroad. Evidence that he is in possession of the land under a recorded deed, claiming the fee, establishes a presumptive title to the easements in the street as well as to the land, especially where defendants are proceeding to acquire title to such easements by condemnation. *Ib.*
19. A refusal, in such an action, to make a finding of the abstract proposition that any benefits accruing to the property from the elevated railroad are to be set off against any damages sustained, is not error, where evidence of such benefits was admitted and presumably had its due weight in the decision. *Ib.*
20. A recovery may be allowed, in such a case, for loss of rental value during the term of a lease of the premises, unexpired when plaintiff purchased them, which had been made after the building of the railroad. *Ib.*
21. In an action to restrain defendants from maintaining and operating their elevated railway along the street in front of premises belonging to plaintiff, the judgment for plaintiff awarded an injunction, with a condition that it should be inoperative upon payment by defendants of a certain sum as damages to the fee from the maintenance of the railroad, and also awarded damages for past injury. *Held*, that error at the trial, in admitting proof of an offer for the property, as evidence of the value of the fee, was not ground for reversal, either as affecting the award of past damages, since that was merely incidental to relief by injunction, or as affecting the amount to be paid in avoidance of the injunction, since that condition was not open to attack by defendants, whether they should reject or accept it; the amount to be paid not being so extravagant as to authorize interference to redress an abuse of discretion. *Lawrence v. Metropolitan El. R. Co.*, 501.
22. A suspension of the operation of such injunction should not be granted to defendants, upon the acquisition of the property by them by condemnation proceedings, either as a matter of right, or as supported by any equity, under the

circumstances; they having for ten years intruded on plaintiff's property without effort, by any legal method, to acquire it. *Ib.*

23. In a similar action, in which a like judgment was rendered for plaintiff, defendant, on appeal, alleged errors at the trial, in both admission and exclusion of evidence of the value of the fee. *Held*, that such errors were not ground for reversal, as affecting the amount to be paid in avoidance of the injunction, since they did not invalidate plaintiff's claim to relief by injunction; the amount to be paid not being so exorbitant as to authorize interference to redress an abuse of discretion. *Doyle v. Manhattan R. Co.*, 506.

24. The construction and operation of such a railway in violation of plaintiff's easements in the highway is a continuing nuisance, for which the owner may recover damages accruing within the six years period of limitation, though the railroad was constructed and operated before that period. *Ib.*

25. Leases of plaintiff's property, made after the construction of defendants' railway, and terminated before the action, will not prevent a recovery therein by him, under section 1665 of the Code of Civil Procedure, providing that "a person seized of an estate in remainder or reversion may maintain an action founded upon an injury done to the inheritance, notwithstanding any intervening estate for life or for years." *Ib.*

26. In another such action, in which a like judgment was rendered for plaintiff, the referee by whom the action was tried refused to find, as a conclusion of law, that plaintiff was not entitled to recover damages for deterioration of the neighborhood caused by the construction and operation of defendants' road. *Held*, that such refusal, even if error, was not ground for reversal, either as affecting the amount to be paid in avoidance of the injunction or as affecting the award of past damages, since it would not be assumed that anything was allowed for such deterioration, as a substantive ground of recovery, no claim

therefor having been made by plaintiff. *Biggart v. Manhattan R. Co.*, 508.

27. In such an action for an injunction, no claim being made for past injuries, a like judgment was rendered for plaintiff, awarding him an injunction with a like condition that it should be inoperative upon payment by defendants of a certain sum as damages to the fee from the maintenance of the railroad; but on the trial defendants were not allowed to avail themselves of special benefits to plaintiff's property from the maintenance and operation of the railroad and the proximity of its stations as affecting the estimate of the amount of plaintiff's damages. *Held*, on appeal from the judgment, that as it appeared from the record that such special benefits might have been found to preponderate over the injury, the error in excluding them from consideration affected, not merely the amount to be paid in avoidance of the injunction, but the right to relief by injunction; and the judgment must be reversed. *Gray v. Manhattan R. Co.*, 510.

28. In another similar action, where plaintiff claimed and the judgment awarded him an injunction and also damages for past injury, on the trial defendants were not allowed to avail themselves of special benefits to plaintiff's property from the proximity of a station of the railway, as affecting the estimate of the injury to the rental value and the fee value of the property. *Held*, that the exclusion of all consideration of such benefits in the award of damages was error, for which the judgment must be reversed. *Welsh v. New York EL R. Co.*, 515.

29. Plaintiff's interest in the premises was a leasehold estate with a contingent right of renewal. *Held*, that it was error to award him a perpetual injunction; the restraint should be only during the subsistence of plaintiff's interest. *Ib.*

30. The theory on which an action to restrain the maintenance and operation of an elevated railroad above a street may be maintained by an owner of land abutting on the

street, is that the continued operation of the road would work a substantial injury to such plaintiff and his property, and that an injunction is necessary to prevent such injury. The primary object of the action is to obtain the relief by injunction; the recovery of past damages is a mere incident, allowable only that complete justice may be done, where plaintiff is entitled to an injunction; and the ascertaining of damage to the fee by reason of future injury is only a matter of favor to the defendant, in order that the injunction may be avoided on payment of the amount so found. In such a case, therefore, the first inquiry must always be whether plaintiff has sustained any injury entitling him to an injunction. *Rich v. New York El. R. Co.*, 518.

81. Where such an action is brought for alleged injuries to several lots owned by the plaintiff, all on the same street and within a few blocks of each other, even though they are not contiguous, special benefits peculiar to one of such lots, arising from the operation of the road, may be offset against the injury to the others, in determining whether on the whole plaintiff has sustained or is likely to sustain such injury as would entitle him to an injunction. *Ib.*

82. Where, upon such consideration and balancing of advantages and injuries to various pieces of property by reason of the operation of defendant's road, it appears that a case of substantial injury requiring equitable interference by injunction is not made out, but the evidence shows that some damage may have been done to certain of the properties embraced in the complaint, and the complaint contains allegations sufficient to entitle plaintiff to recover for such damages in an action at law, instead of dismissing the complaint, the cause may be retained and tried by a jury as an action at law. *Ib.*

See CARRIERS.

RECEIPTS.

Receipts signed by defendant and delivered by him to plaintiffs, for

advances by them to him on goods which he had consigned to them for sale, acknowledged that the money was received from plaintiffs "on account of all goods consigned to them; the same to be sold at their discretion, without limit as to time or price." *Held*, that, in an action by plaintiffs against defendant for a balance of such advances exceeding the proceeds of the sales, parol evidence was admissible for defendant to prove a guaranty by plaintiffs to defendant, as part of the agreement for consignment, that the goods would on a sale realize not less than a certain price. *Wise v. Rosenblatt*, 496.

See SALE, 6.

RECOGNIZANCE.

See BAIL.

REFERENCE.

1. A direction by the referee in an action on account, that plaintiff proceed with his examination of a witness, in the absence of a ledger of defendant which he desired to use, is not ground for reversal, as plaintiff could have given notice to produce the ledger and then recalled his witness. *O'Neil v. Hourc*, 181.
2. A notice to terminate a reference for a failure to file or deliver the referee's report within 60 days, under the Code of Civil Procedure, must be given before the report is actually filed or delivered, though after the 60 days. *Ib.*
3. A stipulation, made at the close of the first day's trial before a referee, that his fees be fixed at \$6.00 for the first hour and \$5.00 for every succeeding hour in a day's sitting, is valid. *Ib.*

RELEASE.

The presumption, in the absence of evidence as to the time of delivery of a release under seal, that it was delivered on the day of its date, is not overcome by the fact that the acknowledgment annexed to it was taken on a subsequent day,

where it does not appear that the person who executed it had possession of it when he made such acknowledgment. *Crager v. Reis*, 450.

See INSURANCE, 1.

REMAINDERS.

Remaindermen may maintain an action in equity to restrain the maintenance of an elevated road in the street in front of the premises in possession of the life tenant, and for damages for the injury to the inheritance. And in ascertaining their damages, the damages to the whole fee may be apportioned between the life tenant and remaindermen according to the annuity tables. *Thompson v. Manhattan R. Co.*, 64.

See RAILWAYS, 25.

REPLEVIN.

In an action to recover possession of goods claimed by plaintiff as mortgagee, brought against the mortgagor and a warehouseman having actual possession of the property, plaintiff's affidavit and complaint alleged that he was entitled to the immediate possession of the goods. The warehouseman answered denying plaintiff's allegations and setting up a lien for storage. *Held*, that the claim of lien was to be deemed controverted, and plaintiff might show, without a reply or any amendment of the pleadings, that the warehouseman had no debt or lien when the action was commenced or afterwards. *Eisler v. Union Transfer & S. Co.*, 456.

See CHATTEL MORTGAGES.

S

SALE.

1. A judgment for plaintiff, in an action to recover for goods sold for a liquor store, will not be reversed where there is evidence that defendants owned the saloon, and after their alleged sale to another permitted their firm name to be

continued without any indication of change of ownership. *Dreher v. Connolly*, 106.

2. The answer in an action for goods sold and delivered was, in substance, a general denial, coupled with an admission that, between the dates mentioned in the complaint, certain goods were furnished defendants, but not to the value alleged. *Held*, that this did not admit the sale and delivery of the goods in controversy; especially as it appeared that, between the same dates, plaintiff had sold other goods to defendants. *Claffy v. O'Brien*, 204.

3. Where a sale of goods has been procured by false and fraudulent representations of the purchaser, the seller may recover them, on proof of the fraud, from a sheriff who has levied on them as the property of the purchaser. *Lewis v. Flack*, 240.

4. Plaintiff contracted to sell to defendants certain real property situated in Thirty eighth Street in the City of New York, of which one N. had been the owner, at the date of his will and at the time of his death, and to which plaintiff claimed title under a clause in the will of N., by which he devised to his wife "all the right, title and interest I possess in and to certain lots in Thirty-seventh Street in the City of New York, which I acquired from Chatfield H. Smith." On a submission upon agreed facts of the question whether defendants should be compelled to specifically perform the contract on their part, it was admitted that no conveyance to N. of any premises on Thirty-seventh Street appeared of record, and that one Chatfield H. Smith, in proceedings for probate of N's. will, testified that he conveyed to N. certain real property on Thirty-eighth Street; that he never sold N. any other real property; and that he knew of no other person bearing his name in New York City. *Held*, that as the truth of this testimony was not conceded by the admission, and as it was not conclusive as against the heirs of N., plaintiff's title was not so free from doubt as to justify a direction

that defendants should accept it. *McGrane v. Kennedy*, 241.

5. After plaintiff had purchased stock in a mining company, at the suggestion of defendant, who assumed to act as plaintiff's broker in such purchase, the property of the company was conveyed to another company, and its shares were made convertible into shares of such other company; and plaintiff so converted his shares. Subsequently plaintiff, alleging that he had discovered that defendant, instead of purchasing the stock as broker, had merely transferred stock owned by himself and retained the purchase price, sought to rescind the purchase. *Held*, that it was not enough, for that purpose, to tender stock in the original company, not converted, which plaintiff borrowed for the purpose, still retaining the stock in the new company which he had received. *Mayo v. Knowlton*, 245.

6. A receipt, signed by defendant, for a sum of money paid him by plaintiff, recited that it was in part payment for a certain house, the price of which was specified, subject to mortgage. When the parties subsequently met to execute the contract, it was discovered that plaintiff had intended to purchase the fee, which defendant could not convey, having only a leasehold of the ground. *Held*, that, on proof of the fact, plaintiff might recover back the part payment. *Stone v. Thaden*, 280.

7. At the trial of an action for goods sold and delivered there was evidence that the goods were part of a large quantity which plaintiffs had agreed with defendant to manufacture abroad, according to sample, and to import and deliver as they arrived; but it also appeared that the price was a specified sum per gross, to be paid a certain number of days after delivery. *Held*, that this sustained a finding that the price of the goods delivered became due and payable at the expiration of the term of credit, and that plaintiffs might recover as on a sale and delivery of such goods, notwithstanding such delivery was under a contract for the sale of a greater quantity; that proof of such

special contract established no defense, a breach thereof not being pleaded as a counterclaim; and that evidence that the goods did not conform to the sample was not admissible, as no counterclaim was set up on that ground. *O'Neil v. Crotty*, 471.

8. A memorandum of a sale of goods was in the form of a bought note, containing the obligation of the buyer, and no more, and was signed by the buyer only. *Held*, that, in an action for part of the price remaining unpaid, the agreement having been executed, so that there was no question of the statute of frauds, parol evidence was admissible for defendant to prove a sale by sample and a warranty, and a breach of the warranty. *Curtis v. Soltau*, 490.

See BROKERS.

CHATTEL MORTGAGES, 4-6.
RECEIPTS.

SERVICES.

See BROKERS.

CONTRACTS, 4, 6, 7.
MASTER AND SERVANT.

SHERIFFS.

1. Persons who, with others, have indemnified a sheriff for selling goods of a judgment debtor, cannot escape payment of their share of expenses incurred by the sheriff in defending an action for conversion of the goods, brought against him by the assignee of the debtor for benefit of creditors, on the ground that they represented to the sheriff when they signed the bond of indemnity, that they had been preferred as creditors and did not wish to attack the assignment, and subsequently, that they did not wish the sheriff to defend the action for conversion. *Grant v. Tefft*, 49.

2. The payment by a sheriff of a fee to his counsel for defending an action creates a legal presumption, in a subsequent action by the sheriff against his indemnitors, that it was a fair and reasonable charge, which is conclusive unless defend-

ant alleges and proves that it is unreasonable. *Ib.*

See SALE, 3.

SLANDER.

In an action for slander, alleged to have caused the discharge of plaintiff from his employment, the slanderous words set forth in the complaint, and alleged to have been spoken by defendant in answer to an inquiry whether defendant had paid plaintiff commissions, were, "We have not paid him any commissions. We have lent him money which he has not repaid, and have done printing for him for which no charge has been made;" and the complaint alleged that the words were accompanied with "certain inflections of voice, glances, gestures, and movements indicating the ironical sense of the words," and explaining the true meaning of the language to be that said loan and services were, in fact, payments as commissions or rewards. There was evidence for plaintiff tending to show the speaking of the words, or part of them, but nothing to support the innuendo relied on. *Held*, that as the gist of the action was not in the words, which were themselves innocent, but in what was alleged to have accompanied them, a motion to dismiss the complaint should have been granted. *Bond v. Brewster*, 82.

SPECIFIC PERFORMANCE.

See SALE, 4.

SPLITTING CAUSE OF ACTION.

See ACTION, 1.

STATUTE OF FRAUDS.

See CONTRACTS, 5.
GUARANTY.
SALE, 8.

STATUTES.

1. A commission should not be granted to take testimony of lawyers of a foreign country to prove a statute of that country and its interpretation, where it is not shown that there is any ambiguity or uncer-

tainty in its meaning, or that it has received any judicial interpretation there, or that it cannot be proved, under section 942 of the Code of Civil Procedure, by an officially printed copy. *Geoghegan v. Atlas Steamship Co.*, 229.

2. Evidence by lawyers of a foreign country, as to the opinion of lawyers there on the construction of a statute of that country, is not admissible where the language of the statute is plain and there is no decision by the courts of such country upon the point in controversy. *Ib.*

STIPULATION.

See ATTORNEY AND CLIENT.
DISTRICT COURT, 2.
REFERENCE, 3.

STOCK.

See SALE, 5.

SUBMISSION OF CONTROVERSY.

See SALE, 4.

SUMMARY PROCEEDINGS.

1. The Court of Common Pleas, on reversing the final order of a district court in summary proceedings, has power, under sections 2260 and 3213 of the Code of Civil Procedure, to order a new trial. *Moench v. Yung*, 143.
2. A petition and precept in summary proceedings by a landlord, served upon sub-tenants, and describing them as "John Doe and Richard Roe, under-tenants," whose true Christian names are not known to the landlord, is sufficient to give the justice jurisdiction under section 2235 of the Code of Civil Procedure, which requires such petition to name or otherwise intelligibly designate the person or persons against whom the proceeding is instituted, and to specify who are principals or tenants and who are under-tenants or assigns. *Asa v. Purnell*, 189.
3. A warrant in summary proceedings for the removal of a tenant is "issued," within the meaning of sections 2251 and 3203, and cancels

the lease of sub-tenants made parties to the proceedings, where it is signed by the justice and delivered to the clerk, though it is never executed. *Ib.*

4. In summary proceedings against a tenant from month to month, for recovery of possession of the demised premises, a final order was made awarding possession to the landlord, and thereupon, without the issue of a warrant, the tenant removed from and surrendered the premises. *Held*, that the tenancy was terminated, and the landlord could not recover rent for the ensuing month. The provision of section 2253 of the Code of Civil Procedure, that the issuing of the warrant cancels the agreement and annuls the relation of landlord and tenant, is not to be restricted in its application where the issue of the warrant is not necessary. *Gallagher v. Reilly*, 227.

See FORCIBLE ENTRY AND DETAINER.

SUMMONS.

A six days summons issued in an attachment suit in the city court of New York, instead of a ten days summons, as required by subdivision 2 of section 3163 of the Code of Civil Procedure in case of service of the summons by publication, is not an absolute nullity, and may be amended, under section 723, after publication has been commenced, and after thirty days from the issue of the warrant, though the summons was not issued until the order for publication was made. *Deimel v. Scheveland*, 34.

See DISTRICT COURT, 3.
ORDERS.

SUNDAY.

A contract to render instructions to another in certain secrets of the art of photography, the instructions to be given on Sunday, is in violation of the prohibition of the Penal Code, as amended by Laws 1883, chapter 358, against labor on Sunday, excepting works of necessity or charity; and no recovery can be had thereon. *Bilordeaux v. H. Bencke Lith. Co.*, 78.

SUPPLEMENTARY PROCEEDINGS.

1. An order in supplementary proceedings required a judgment debtor to deliver to the receiver appointed in such proceedings, a policy of insurance on the debtor's life, which he alleged he had assigned as security for an indebtedness due from him to an estate of which he was executor. *Held*, it appearing that such policy was then in the hands of the substituted trustee for the estate, and claimed by him as such security, that the judgment debtor's right to possession was "substantially disputed" within section 2447 of the Code of Civil Procedure, and the order should be so modified as to require only that the judgment debtor assign to the receiver the policy and all his right, title, and interest therein, so that the receiver might take proceedings to recover it from the substituted trustee. *Frost v. Craig*, 107.

2. An order for examination of a debtor in supplementary proceedings, and a subsequent warrant for his arrest in such proceedings, are independent, and the vacating of the order does not affect the warrant. *Ib.*

3. A motion to vacate a warrant in supplementary proceedings waives all irregularities in the recitals not specified therein. *Ib.*

SURPLUS MONEYS.

See FORECLOSURE, 2-4.

SURRENDER.

See LANDLORD AND TENANT, 3,
4, 8, 10.

T

TIME.

See CONTRACTS, 1.

TRIAL.

At the trial of an action against a railroad company for damages for the death of a person killed by an accident at a public street crossing of defendant's road, alleged to have

been caused by negligence in the management of one of defendant's trains, a statement by the judge in his charge to the jury, that the crossing was a dangerous one, does not amount to a misdirection, where he leaves all essential facts to be determined to the jury, and no specific request is made that that fact be submitted to them. *Quill v. New York Cent. & H. R. R. Co.*, 313.

See APPEAL, 9 12, 15, 19, 21, 22.
CARRIERS.
DISTRICT COURT, 3.
MUNICIPAL CORPORATIONS,
2.
NEGLIGENCE, 1, 2, 8, 9.
RAILWAYS, 9-32.
REFERENCE.

U

UNDERTAKING.

See APPEAL, 8.

V

VARIANCE.

See NEGLIGENCE, 2.

VENDOR AND PURCHASER.

See SALE.

W

WAIVER.

See INSURANCE, 2, 3.
SUPPLEMENTARY PROCEED-
INGS, 8.

WAREHOUSEMEN.

1. Where a mortgagor of chattels, after default in payment of the mortgage debt, making the mortgagee's title and right to immediate possession absolute, stores the goods with a warehouseman without the knowledge or assent of the mortgagee, the warehouseman has no lien on the goods as against the mortgagee. *Baumann v. Post*, 385, *Eisler v. Union Transfer & S. Co.*, 456.
2. Laws 1885, c. 526, giving a ware-

houseman a lien for his storage charges, etc., on the goods stored, was not intended to give such lien, as against the goods when stored by another than the true owner, in fraud of the owner's rights. *Baumann v. Post*, 385.

3. The mere possession of the mortgaged chattels by the mortgagor after default does not enable him to bind the mortgagee, as representing him as bailee or agent, so as to make him liable for storage charges; especially where the warehouseman was not misled into trusting to a long continued possession, and the delay of the mortgagee in taking possession was not in any sense fraudulent. *Ib.*

4. A warehouseman's lien has no precedence, on the ground that it is a common-law lien, over the lien of a chattel mortgage, which was also recognized at common-law, and is not a mere statutory lien. *Ib.*

5. A warehouseman's lien on goods stored by the mortgagor thereof after a default, by which the mortgagee's title and right of possession have become absolute, cannot be sustained against the mortgagee on the ground that the storage was for the security and protection of the goods, where the mortgage expressly provided that they should not be removed from the place where they were when mortgaged. *Ib.*

6. Precedence should not be given to a warehouseman's lien for storage, over a prior chattel mortgage, as a matter of public policy. *Ib.*

See PLEDGE, 2.
REPLEVIN.

WASTE.

A tenant of a house from year to year removed therefrom before the expiration of the year, and securely closed the premises, but, within a few days thereafter, the plumbing work was cut out and stolen by persons unknown. *Held*, that this was commissive waste, for which the tenant was liable to the landlord, although the act of strangers. *Regan v. Luthy*, 413.

WILLS.

1. Formalities prescribed for the execution of a will, and made by statute indispensable to the validity of a testamentary paper, are: (1) the paper must be subscribed by the testator in the presence of the attesting witnesses; (2) each of the attesting witnesses must sign his name at the end of the paper; (3) the testator, at the time of his subscription, must, in the presence of the witnesses, declare the instrument to be his will; (4) each witness must sign his name at the request of the testator; and (5) either the subscription of the will by the testator must precede the signing by the witnesses, or he must subsequently acknowledge his subscription in their presence. *Matter of Blair*, 540.
2. In the statutory requirement of "sound mind and memory" to constitute testamentary capacity, those terms are not to be taken in their literal and absolute sense. A person who is able to recollect the objects of his bounty and the particulars of his property, to understand the provisions of the will, and to exercise a rational judgment in the transaction, is of testamentary capacity, however aged or infirm he may be, though age and infirmity may be considered in determining the question; but mental and physical debility alone does not incapacitate. *Ib.*
3. The undue influence which renders invalid a will thereby procured is such influence as suppresses the independent volition of a testator—as destroys his free agency—and constrains him to give expression to the will of another instead of his own. *Ib.*
4. Circumstances which the law recognizes as indicating the absence of undue influence are, that the will expresses the known and declared purpose of the testator; that the testamentary disposition is in harmony with his mental inclination; that the instrument was drawn in conformity with his instructions, and that he subsequently expressed his satisfaction with it. On the other hand, the law recognizes, as indicating the presence of undue

influence in the testamentary act, such circumstances as physical and mental weakness of the testator at the time; discrepancy between his declared intention and the provisions of the will; unnatural or unjust testamentary dispositions; exclusion of heirs from any knowledge of the making of the will; and the fact that a beneficiary stands in a confidential relation to the testator. *Ib.*

See PARTNERSHIP, 2.

WITNESSES.

1. A witness called to impeach another testified that he had been in the same business as such other for 18 years, and had business dealings with him, and was then asked what such witness's reputation was for truth and veracity, and whether he would believe him under oath. His residence was not shown. *Held*, that it was not error to exclude the question for want of a proper foundation. *Healey v. Terry*, 117.
2. In an action for personal injuries caused by defendant's negligence, a person not an expert may testify as to the extent of plaintiff's injury immediately after the accident, where it involves only a description of his appearance. *James v. Ford*, 126.
3. Plaintiff in an action for conversion of furniture, left with defendant for repairs, is competent to testify as to its value, where it appears she had bought and sold second-hand furniture at auction, and had attended many such sales. *Phillips v. McNab*, 150.
4. Testimony that certain payments were made on account of the debt sued for is not necessarily the conclusion or opinion of the witness; and, where given without objection or cross-examination as to the circumstances, is sufficient to take the case out of the statute of limitations. *Ramsay v. Barnes*, 478.

See APPEAL, 9-11, 19.
 CONTRACTS, 3.
 DIVORCE, 2-4.
 EVIDENCE, 3.
 REFERENCE, 1.

Ex. J. H.

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